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SUPREME COURT.

OF THE UNITED STATES.

No. 252.

NEW ORLEANS, SPANISH FORT AND LAKE RAILROAD COMPANY,
PLAINTIFF IN ERROR.

versus.

GEORGE DELAMORE, J. R. A. GAUTHREAUX, CIVIL SHERIFF OF THE PARISH OF ORLEANS, AND THE CIVIL SHERIFF, SUCCESSOR, ETC.,
DEFENDANTS IN ERROR.

ROBERT MOTT,
Of Counsel.

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I.

STATEMENT OF CASE.

The plaintiff in error is the owner in possession and enjoyment, of the property sold in the bankruptcy of the Canal Street, City Park and Lake Railroad Company, by order of the United States District Court, which property defendant in error, Delamore, has caused to be seized by the sheriff, under an execution from the State Court and advertised for sale, as the property of another corporation of the same name as the Bankrupt Corporation, under the pretense that the said property was not administered upon and sold by order of the Bankrupt Court; that no title was derived from said bankrupt sale; that the right of way, conferred by the City of New Orleans, on the Bankrupt Corporation, was inalienable, and could not be surrendered in bankruptcy, nor sold. But at the same time, the said defendant in error, is attempting to sell under execution, precisely the same kind of property, viz.: a grant of right of way, from the City of New Orleans to the Canal Street, City Park and Lake Railroad Company, a subsequently organized corporation, over the same streets and territory, as that sold by orders of the Bankrupt Court.

The Canal Street, City Park and Lake Railroad Company, was a corporation organized under the laws of the State of Louisiana, and the grantee of a right of way, from the City of New Orleans, to construct and maintain a Street Railroad from one part of the city along certain streets to a suburban resort known as Spanish Fort, also within the city limits, dated the 6th August, 1883, to be found in ordinance No. 2264, pp. 82 and seq., P. T. That corporation was in the matter of Hampton, et al. vs. the Same, No. 1531, on the docket of the District Court of the United States, for the District of Louisiana adjudicated a bankrupt in 1876; and among the assets, surrendered to the assignee, was the railroad tract, all and singular, built in pursuance of the charter of said company, and the various grants or privilege conferred on said companies by the City of New Orleans and constructed through the following streets." * * * * "including road-beds of main tracts and branches, the rights of way thereto attached, and all franchises and appurtenances of said Canal Street, City Park and Lake Railroad Company." The assignees applied for an order of sale of the property to pay mortgage and other debts, pp. 23 and 24, P. T., and all the franchises and appurtenances of said Company were ordered to be sold pp. 26 and 27 P. T., on terms of cash and credit, in notes to be secured by mortgage on the property sold, the mortgage to contain the clause *de non aliendo* p. 28, P. T.

The sale was made to Thomas H. Handy, p. 29, P. T. The property adjudicated was "all the right of way and franchises of the company, the track, bridges iron, and all and singular the appurtenances," with the rolling stock and including the franchises, meaning the right of way. Thomas H. Handy who bought at bankrupt sale, and executed the mortgage to secure the price, sold the property to the Canal Street, City Park and Lake Railroad Company, and that company in acquiring of Handy, stated in the deed of purchase, that it bought all and singular the right of way, powers, privileges, immunities and franchises conferred and granted by the City of New Orleans to the late Canal Street, City Park and Lake Railroad Company, under an ordinance No. 2264, adopted on the 5th day of August, 1873, by the council of said City of New Orleans and amended by ordinance No. 2548, adopted March 24th, 1874, by said council, and the right of way, franchises and privileges granted by said city to said company on Basin, Customhouse, Bienville and Patrick streets, and Metarie Road and through the City Park to Lake Pontchartrain and thence to Spanish Fort, with the returns through the same. See Act of sale, pp. 19, P. T., and in that purchase the said purchaser assumed the mortgage of said Handy and his agreement to pay the debt created for the purchase of said property by him; and said company, held said property subject to said lien and privilege.

Both Handy and the Railroad Company to whom he sold, made default in the payment of the mortgage debt, and at the suit of Elizabeth Strathman, et al., holders of the mortgage note, vs. Thomas H. Handy, No. 9486, in the Fifth District Court of the Parish of Orleans, the said property including the right of way, was seized and sold to Moses Schwartz & Bro., p. 63 et seq., P. T., and pp. 69 and 72, P. T., and Moses Schwartz & Bro., sold the same to the present plaintiff in error, on the 9th of April, 1879, who has ever since held possession, and used said franchises or right of way, without interference or molestation on the part of the City of New Orleans, the grantee of said right, or of any one except Delamore, a creditor of the second corporation of the Canal Street, City Park and Lake Railroad Company, who is attempting to seize and sell the same kind of right, the right to acquire which he denied to us.

The City of New Orleans by ordinance No 4523, administration series adopted 21st May, 1878, p. 50 et sec., P. T., granted to the Canal Street, City Park and Lake Railroad Company, "the right of way" "to lay a single and double track, on passenger and freight railroad," through and on the same streets as had been previously granted by ordinance No. 2264, in 1873 to the Canal Street, City Park and Lake Railroad Company, and it is this right of way, these powers, privileges, immunities and franchises granted in 1878, that the defendant in error, Delamore, has seized and advertisad for sale, under execution, and the sale of which the plaintiff in error has enjoined. See p. 18, P. T.

Thus it is, that, what is asserted to be inalienable, and could not be seized and sold or transferred, in the case of the first corporation of the name of the Canal Street, City Park and Lake Railroad Company, can now be seized and sold in the case of the second corporation of the name of the Canal Street, City Park and Lake Railroad Company. But surely if the right of way or franchises to construct and maintain a street railroad cannot be seized or alineated on one instance, it cannot be in another.

The property, viz.: the Pavilion, the sale of which was also enjoined is not in dispute, as to it, the injunction was maintained, and the defendant in error does not complain.

II.

ERRORS.

1. The error consists in the ruling of the Supreme Court of Louisiana, that the right of way, to construct and maintain a street railway, granted by the City of New Orleans, to a corporation created for railroad purposes, could not be surrendered and sold in the bankrupt proceedings, in which the estate of the corporation was administered, and in

2. Dissolving the injunction granted by the lower court, restraning the sale of such a right of way at the instance of a creditor of another similar corporation, the same being identical in character with that surrendered and sold in the bankrupt proceedings, while the plaintiff in injunction was in the undisturbed possession and enjoyment of the said right of way, unquestioned by the City of New Orleans, the grantor thereof.

3. The title and ownership of the property in the possession of the plaintiff in error, could not be attack collaterally, by a seizure, but must be by direct action.

III.

POINTS OF LAW.

The Supreme Court of the United States, has jurisdiction in error over a judgment of the Supreme Court of Louisiana, where the only controversy in the case is, as to the effect to be given to the sale of property under an order of the District Court of the United States in bankruptcy to sell the bankrupts morgaged property, free from incumrances, Factors' Insurance Company vs. Murphy, 1I1 U. S., 738.

Whether or not the franchise *to be a certain corporation or body politic* can be transferred or assigned voluntarily, or by sale under execution, is a question the solution of which either way is unimportant to this discussion as the plaintiff Company does not claim to have acquired any such franchise by transfer or assignment, but claims to be a body corporate, organized under the general laws of the State providing for the organization of corporations for works of public improvement.

The right which the plaintiff company claims to have acquired under the sale in bankruptcy and mesne conveyances from the first Canal Street, City Park and Lake Railroad Company, is the right to operate and use the railroad and its appurtenances, which the Supreme Court of Louisiana, concedes the plaintiff company has so acquired, for the purposes for which the railroad and apputenances were constructed and designed, upon the same terms and conditions, and subject to the same liabilities and duties to the public, the city and the State, as were applicable to the first Canal Street, City Park and Lake Railroad Company.

We *deny* that where a corporation has been organized under the general laws of the State for the purpose of building, maintaining and operating a railroad, has obtained a right of way for the road in a lawful manner, and has constructed, equipped and operated the road in conformity to law, and has incurred debts, that it is to the interests of such corporation, or of its stockholders, or of its creditors, or of the public, or of the city, or of the State, that a sale of the property of the debtor corporation under execution should in all cases, except where the sale is made in the enforcement of the one species of mortgage mentioned in the opinion of the court, have the effect to *sever from the property the right to use it* for the purpose for which it was constructed and designed, the right of so using it constituting the main element of its value, thereby reducing the railroad and its accessories to the value of the mere material of construction—or of so much old junk!

We *deny emphatically*, upon principle and authority, that, at the time of the surrender in bankruptcy of the assets of the first company, and the sale thereof by the special master, or at any time subsequently there was or has been anything in the laws of the United States or the State of Louisiana, or any sound consideration of public policy, which required or warranted a severance from the right of property in the railroad and its accessories, of the right to operate and use them for the same purposes, in the same manner and upon the same terms and conditions as attached to the right of ownership in the hands of the first company.

Further, we say, that all of the rights of way, privileges and franchises of the first company, as they existed at the time of the surrender in bankruptcy, were by the District Court of the United States, for the District of Louisiana, sitting in bankruptcy, a court of competent jurisdiction in the premises, ordered to be sold by a special master of that court; that, in obedience to said order, they were sold by said master to Thomas H. Handy; that this sale was reported to the court, and a decree entered confirming it, and ordering a conveyance thereof to be made, by notarial act, by the master to Handy—which was done accordingly. We say that the District Court of the United States was itself the vendor of the franchises and the rights in question to Handy, and that such title, by judicial sale of specific property, in obedience to a decree of a court of competent jurisdiction, is binding, not only on all the parties to the proceeding, but upon all the world, and can only be attacked before the court which ordered and confirmed the sale, and can only be attacked there upon averment of fraud to which the purchaser was privy; and that the correctness of the proceedings of that court, and validity of the title passed by it to the property cannot be attacked or collaterally called in question in any other court. Much less has any other court the right to pronouce the nullity of the proceedings of such court of competent jurisdiction, and of the title acquired from and confirmed by it, as has done in this case.

The right of the sovereign—the State—to determine to whom the administration of its franchises shall be entrusted, and to provide that the administration of them shall not be transferred, without the consent of the grantor, to others than those originally selected by the State of course is not questioned. Where special franchises have been granted to particular corporations by special enactment, that is, where there has been a special enactment or designation of the grantees of the franchises by the State or Sovereign as was formerly very generally the case, then the authorities referred to by the court to the effect that such franchises are not transferable or assignable except with the consent of the grantor are revelant, and there is an intelligible though somewhat artificial reason for the rule. But we submit that those authorities have no revelancy whatever when sought to be applied to cases where there *has been no special selection or designation of grantees* of *the franchise*, but the franchise may be exercised *by all* who will comply with the requirements of a general law of the State. Why should a special consent of the grantor be required to the transfer of a franchise to the original acquisition and exercise of which no special grant or act of the State was requisite?

The policy of the State of Louisiana as declared and defined by its constitution and laws from 1845 to this day, has been at all times not to require any special act or consent of the State to the creation of corporations, other than those of a municipal or political character, or to the acquisition of such franchises as are connected with the constructing, owning, maintaining and operating works of public improvement, such as railroads. It is so unreasonable to contend that a right or franchise which may be originally acquired and exercised without any special act or consent of the State, cannot be transferred without such special consent, that we shall waste no words in endeavoring to demonstrate the absurdity of it.

By the constitution of the State of Louisiana of 1845, Art. 123, it was declared that, " Corporations *shall not be created by special laws*, except for political or municipal purposos; but the Legislature shall provide *by general laws* for the organization of all other corporations, except corporations with banking or discounting privileges, the creation of which is prohibited."

Art. 121 of the constitution of 1864 is to the same effect.

Since the year 1855 it has been the policy of the State of Louisiana at all times to allow voluntary associations of persons, not less than six in number, to constitute themselves a body corporate, without any special grant from the State, with the right to construct, own, maintain and operate railroads between any points in the State, with power to acquire lands necessary by purchase or expropriation, with no limit whatever upon the location of the road other than that the lands over which it is to be constructed must be acquired by the company, and that no railroad shall be constructed through the streets of any incorporated town or city without the consent of the council thereof.

When such consent is granted it is obvious that the franchise to maintain and operate a railroad is no more derived from the grant of the right of way by the city, than it is derived from the acquisition of the right of way elsewhere, but that the franchise is acquired from the State under the general laws providing for the organization of corporations for works of public improvement; that there can be no question of any forfeiture or reversion to a town or city of such franchise; and that where corporate capital has been expended in the construction of a railroad through the streets of a city, upon the faith of the consent of the city thereto, the mere transfer or assignment of the road and its appurtenances would not authorize the withdrawal of the consent of the city after the corporate capital had been expended in the construction of the road.

Citation of authority is hardly needed in support of proposition so plain. We refer, however, to *C. C. R. R. Co. vs. the People*, 73 Illinois 548, where it was said that it was a misconception of the law that a railway company derives its power to construct a railroad from any ordinance of the city—that of all its authority is from the State, and conferred by its charter.

Acts of 1855, No. 131, p. 182; Rev. St. of 1870, Secs. 683, 684, 689, 698, *et seq.*

After the surrender in bankruptcy of the first New Orleans, City Park and Lake Railroad Company, a petition was filed by J. A. Shakspeare the assignee, which will be found at p. 23, P. T., in which, among other things, it is set forth, that among the assets surrendered and belonging to the estate in bankruptcy, were "the railroad track all and singular, built in pursuance of the charter of said Company, and the various grants or privileges conferred on said Company by the City of New Orleans," etc., and that the said property was encumbered by certain specified "*mortgages*, judgments, liens and privileges," which are enumerated, among them a mortgage in favor of the New Albany Railmill Company for $19,772. 76; a mortgage in favor of Wm Henry for $35,000, and a number of other mortgages and liens in favor of material-men, mechanics and others The petitioner represented that it was impossible for him to determine the validity of the encumbrances and the amounts due thereon by agreement between himself and the creditors secured by said liens and mortgages, and he prayed to be allowed to sell the property clear of encumbrances, reserving the rights of the creditors upon the proceeds.

On this petition, the property was ordered to be sold by the court by a special master; was sold in obedience to said order, the sale reported to the court and by it confirmed, and an authentic act of sale passed by direction of the court by the special master to the purchaser, the rights and franchises of the company being specifically referred to at every stage of the proceedings, and expressly included in the act of sale.

In thus administering upon the assets of the bankrupt company, including the rights and franchises incident to the ownership, maintainance and operation of the railroad, the United States District Court for this district was fully warranted by precedent and authority.

In *re Southern Minnesota Railroad Company*, 10 B. R., 89,

Nelson, J., said: * * "While it may be conceded that the naked franchise to build a railroad or railroad bridge cannot be reached by an execution issued upon a judgment obtained in an action at law, it by no means follows, that, where the right to transfer such franchise has been granted by the Legislature, it is impossible for a court to compel its subjection to the just demands of the creditors when an appeal is made to its equitable powers.

But in as much as the corporation is subject to all the provisions of the bankrupt act, it is certainly possible for the Distridt Court or the Register, to make *a transfer of all its property, including its franchises*, and administer its assets in the same manner as is provided in respect of natural persons."

The question of the power of the United States courts, sitting in bankrupcy, to deal with the franchises of a bankrupt railroad corporation, is thoroughly and exhaustively discussed in the two following cases, to which the attention of your honors is earnestly invited:

Adams vs. Boston, Hartford and Erie Railroad Company, 4 Bankr, R. (folio) p. 99, U. S. District Court for the District of Massachusetts.

Shepley, J. This is a motion to dismiss the petition in this case upon the ground that railroad corporations are not included within the provisions of the 37th section of the bankrupt act, and that therefore this court has no jurisdiction in bankruptcy to entertain this petition.

The first ground of objection is, that a railroad corporation *is a public corporation, created for a public purpose and bound to the State for the performance of a public duty.* * *

It is further contended, however, that the Legislature of Massachusetts in creating this corporation has subjected it to certain duties and liabilities; *that the liabilities are not transmissable; that these duties cannot be delegated; that the corporation cannot divest itself of the power it has of performing these duties; "that it is a Massachusetts corporation, a creature of the laws of Massachusetts,* placed under the supervision of the authorities and courts of Massachusetts, and *liable to perform certain duties, which, by the laws of Massachusetts, cannot be performed by any person to whom its property may be transferred or its franchises delegated.*"

The force of the argument, which seems to apply solely to Massachusetts corporations, and to claim the application to Massachusetts railroad corporations of a special exemption from the operation of the bankrupt act, independent of and distinct from any rule which may apply to railway corporations existing under the laws of other States, is somewhat impaired by the fact that the duties of the corporation have been delegated, and are now delegated, by the action of the Supreme Court of Massachusetts, to a board of receivers; that by the action of the same distinguished tribunal this corporation has been and now is, in fact, divested of the power of performing its public duties, and that it is not now, by reason of the action of the highest judicial tribunal in the Commonwealth, in the possession or exercise of its franchises, so far as those franchises confer upon it the power to build, operate and control the railroad.

And we look in vain into the legislation of Massachusetts for any indication of public policy *to exclude the property of railroad corporations or such of their franchises as are in their nature assignable and transferable, from the liability to be taken by due process of law and applied to the payment of corporate debts.*

East Boston Freight Railroad Company vs. Hubbard, et als., 10 Allen, 459, note, is a case where the Grand Junction Railroad and Depot Company became insolvent, and George W. Gordon, a creditor, recovered judgment, and the sheriff levied his execution *upon their franchise*, and sold the same, with all the rights and privileges, so far as relates to receiving of tolls for the term of ninety-nine years. The title of the purchaser at the sheriff sale was upheld by the court.

A corporation created for the purpose of constructing, owning and managing a railroad, can not, it is true, make any alienation of its general franchise to be a corporation, or its subordinate franchises to manage and carry on its corporate business, without distinct legislative authority. Such is the law in England, French v. Brokerherd, 13 E. L. and E., 506, and in Massachusetts, Hoxie vs. Pinkerton, 14 Allen, 385; Richardson vs. Sibley, 11 Allen, 65; Commonwealth, vs. Smith, 10 Allen, 455.

This distinct legislative authority for the alienation of the assignable and transmissible franchises of railroad companies to carry on their business of managing a railroad and taking tolls has been freely accorded in Massachusetts, and the public policy of the Commonwealth embodied in its legislature *allows a creditor to sell these franchises in execution, and permits the corporation themselves, within prescribed limits, to alienate them for the payment of debts or the security of creditors.* * * *

But it is not believed that the question whether railroad corporations are subject to be dealt with under the provisions of the bankrupt act, is one which is dependent upon the special provisions of the statutes of the several States regulating the *transfer of the corparate property or franchises, or applying them to the payment of the corporate debt*.

The grant of constitutional power to Congress to establish uniform laws on the subject of bankruptcies throughout the United States, is general in its terms and unlimited. It was not doubted, at the argument of this motion, that it applied as well to corporations as natural persons. The only question which can arise is, whether Congress has, by appropriate legislation, in the exercise of its powers conferred by the constitution, rendered railroad corporations subject to the provisions of the act. As the system of bankruptcy is to be *uniform* throughout the United States, the solution of this question must depend upon the construction of the terms of the act itself, and not upon the particular legislation of the several States. * * *

We have already seen that the public policy of the State in which this corporation exists allows the alienation of the franchises and property of railroad corporations for the payment of their debts. The inconvenience attending such alienations is obvious. But as the argument *ab inconvenienti* has not been sufficiently strong to prevent these franchises from being sold and the proceeds of the sale applied in payment of debts of the first attaching creditors, it certainly does not apply with greater force to a statute providing for the more equitable division of the proceeds among all the creditors.

The franchise which authorizes a number of persons to be incorporated and subsists as a body politic, with power to maintain perpetual succession, is not alienable or transferable without direct and positive legislative authority. This is the franchise to be a corporation. It is the life of a corporation. Coupled with the grant of this franchise of corporate existence, are the grant to the corporation of the franchises to carry on the corporate business, which are grants of valuable privileges, and which in the case of most private corporations may be transmitted (as the history of this corporation shows they have been transmitted repeatedly) *from one corporation to another*, *or to individuals*, without great detriment to any public objects for which they were created.

This distinction between the powers of a corporation which are *inalienable with a positive provision of law*, *and those possessing nothing inconsistent with their being transfered or assigned*, has never been more clearly defined than in the opinion of Mr. Justice Curtis, in the case of *Hall vs. The Sullivan Railroad Company*, 21 Law Rep., 138.

" The franchise *to be a corporation* is, therefore, not a subject of sale and transfer, unless the law by some positive provision has made it so, and pointed out the modes by which such sale and transfer may be effected. But the franchises to build, own and manage a railroad, and to take tolls thereon, are not necessarily corporate rights; they are capable of existing and being enjoyed by natural persons, *and there is nothing in their nature inconsistent with their being assignable.*"

The grantee of the franchises of a corporation to operate a railroad can acquire no greater rights than the corporation itself has by the terms of the charter. *The purchaser must take his title subject to the conditions of the original grant, and subject to all duties and liabilities to the State, to the public and individuals, none of whose rights can be impaired by the transfer.*

It does not appear to us that there are any such inherent difficulties in the way of the sale and transfer of the property and franchises of a railroad, subject to these conditions and limitations, as will require us to give such a construction to the statute as would exclude the corporations from the operation of that clause of the bankrupt act, a liberal construction of which clearly renders them liable to be dealt with under its provisions."

In Sweat vs. Boston, Hartfort and Erie Railroad Company, V. Bank, R., 243, the foregoing opinion was affirmed by Mr. JUSTICE CLIFFORD. * * " In all these cases the uses may, in a certain sense, be in the public, but the *corporations are private, as much so, indeed, as if the franchises were vested in a single person* * *

But suppose that the franchise to be a corpora tion, unless assignable by the laws of the State, i^S not transmissable under the bankrupt act, *still it is unquestionably* true, as was held by the District Court in this case, *that the franchise to build and manage a railroad, and all the property of the company are* *alienable and subject to sale and transfor* under the laws of the State which created the corporation. * *

Much discussion of this point, however, is unnecessary, as the court here *concurs entirely with the views expressed by the Circuit Judge* in disposing of the case in the District Court. *Adams vs. Railroad Company*, 4 B. R., 99."

We are aware of the existence of no authorities adverse to those just quoted with regard to the power of the Federal Courts sitting in bankruptcy to deal with the franchises of bankrupt railroad companies. The Federal Courts have also dealt in the same manner with the franchises of railroad companies in the exercise of their jurisdiction as courts of equity. In Wisconsin, as in Louisiana, a money judgment of an ordinary creditor duly recorded in the proper office, becomes a lien on the real estate of the judgment debtor, and in the case to which we will next refer the Supreme Court of the United States held, that a sale made under a decree of the Circuit Court to satisfy such a lien upon the property of a Railroad Company, passed *the whole interest of the comyany* as it existed at the time of the rendition of the judgment.

In Railroad Company vs. James, 6 Wallace, 750, Cleveland recovered a money judgment against the La Crosse and Milwaukee Railroad Company and assigned his judgment to James. Subsequently to the entry of this judgment the company mortgaged its road, and under this mortgage the Eastern Division of the road was sold, the Western Division having been sold under liens prior to both Cleveland's judgment and the mortgage. The purchasers of the Eastern Division, under foreclosure of mortgage, organized a new company under the name of the Milwaukee and Minnesota Company and took possession of the road.

James then filed his bill in the Circuit Court against the latter company for the purpose of having his judgment declared a lien on the Eastern Division of the road, and of having the same sold to satisfy the judgment.

The court decreed that the judgment was a lien from the time of its rendition; that the LaCrosse Company had ceased to exist as a corporation, and that the Milwaukee and Minnesota Company had succeeded to its rights as to the Eastern Division, subject to all prior liens and directed a sale of that division by the Marshal, which was made, reported to the court and confirmed.

Three appeals were taken—one on a petition of two stockholders in the Minnesota Company, asking that the decree be vacated, and they be let in to defend. :

One on a petition of the Minnesota Company to stay sale and open and vacate decree, which was denied :

And one on appeal, by the same company, from the order confirming the sale.

The Supreme Court of the United States, through MR. JUSTICE NELSON, as the organ of the court, disposed of all the appeals summarily, in an opinion of sixteen lines. "The La Crosse and Milwaukee Company, by virtue of its charter and the proceedings under it acquired a title in fee to the road-bed; and the rolling stock owned by it, and used and employed in connection with the road, is made a fixture by an express statute of the State of Wisconsin, and such, we think, is the law according to the true construction of the charter independent of the statute. By the statute law of Wisconsin judgments are liens on real estate, and we do not doubt but that this judgment became a lien on the road from the time of its rendition, and *that a sale under a decree in chancery, and conveyance in pursuance thereof, confirmed by the court, passed the whole interest of the company, existing at the time of its rendition to the purchaser.*

A great many objections have been taken to the decrees below, but those of any substance or force will be found answered by the principles above stated. "DECREES AFFIRMED."

In State vs. Morgan, 28 A., 484, it was held by a divided court, that a sale under ordinary writs of *fieri facias* against the New Orleans, Opelousas and Great Western Railroad Company, of the property of the company, on a line of railroad running from Brashier City Northwesterly, et., the franchises of the road did not pass to the purchaser, for the reason " that when the State covenants and agrees that a *certain corporation* shall administer *certain franchises*, the ordinary creditors of that corporation may seize and sell its property, but not its franchises. It is a State perogative to put the administration of its franchises into such hands as it may choose, and they cannot be transferred to other hands without the consen of the State." And the court then goes on to refer to the special statute of 1852, by which the State granted the franchises in question to the New Orleans, Opelousas and Great Western Railroad Company a grant of certain franchises to a certain company. The reasoning can have no application to franchises not acquired by any special grant from the State, but which could have been acquired by any self-constituted corporation under the general laws of the State, there being an entire absence of anything in the nature of special choice or consent on the part of the State·

Mr. Justice Howell concurred merely in the conclusion and decree, which was, that a certain immunity from taxation by the State granted to the corporation by its charter did not pass to the purchaser at the Marshall's or Sheriff's sale, which conclusion and decree we believe to be correct, as it was held to be on appeal by the Supreme Court of the United States.

LUDELING, C. J. dissented, and although we do not concur in his views, in so far as the question of immunity from taxation is concerned, we think his reasoning, that franchises are incorporeal hereditaments, as well known as any estate in land, and that by the texual provision of the code not only corporeal object may be sold "but also *incoporeal things*, such as a debt, an inheritance, a servitude or *any other rights*. C. C., 2449," as applied to such franchises as are in question in this suit, is sound and conclusive. And such was the view taken of the matter by the Supreme Court of the United States, in Morgan vs. Louisiana, 93 U. S., 217.

MR. JUSTICE FIELD, delivering the opinion of the court, said: * * "Much confusion of thought has arisen in this case and in similar cases from attaching a vague and indefinite meaning to the term "franchises." It is often used as synonymous with rights, privileges and immunities, though of a personal and temporary character; so that, if any one of these exists, it is loosely termed a "franchise," and is supposed to pass upon a transfer of the franchises of the company. But the term must always be considered in connection with the corporation or property to which it is alleged to appertain. The franchises of a railroad corporation are rights or privileges which are essential to the operations of the corporation and without which its road and works would be of little value; such as the franchise to run cars, to take tolls, to appropriate earth and gravel for the bed of its road, or water for its engines, and the like. *They are positive rights or privileges, without the possession of which the road of the company could not be successfully worked.* Immunity from taxes is not one of them. *The former may be conveyed to the purchaser as part of the property of the company ;* the latter is personal, and incapable of transfer without *express statutory* direction.

In West River Bridge Company vs. Dix, 6 Howard, 507, MR JUSTICE DANIEL, delivering the opinion of the court, said : * * " *We are aware of nothing peculiar to a franchise which can class it higher or render it more secured than other property. A franchise is property and nothing more.*"

And MR. JUSTICE WOODBURY, in his concurring opinon, at p. 541, said : * * " I concur in the opinion that a corporation to build a bridge, like that of the plaintiff's in error, is itself in one sense, a franchise. * * And in another sense, that it possesses franchises incident to its existence and objects, such as powers to erect the bridge and take tolls * * I concur in the views also that such a franchise as the incorporation is a species of property. * * It is a legal estate vested in the corporation. But it is often property distinct and independent of the other property in land, timber, goods or choses in action which a corporation, like a body not artificial, may own. * * *It is also property subject to be* immunity from taxation is concerned, we think his reasoning, that franchises are incorporeal hereditaments, as well known as any estate in land, and that by the texual provision of the code not only corporeal object may be sold "but also *incoporeal things*, such as a debt, an inheritance, a servitude or *any other rights*. C. C., 2449," as applied to such franchises as are in question in this suit, is sound and conclusive. And such was the view taken of the matter by the Supreme Court of the United States, in Morgan vs. Louisiana, 93 U. S., 217.

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In Covington Drawbridge Company vs. Shepherd and another, 21 How., 112, the franchises of the corporation to levy tolls upon their bridge over the Wabash River, a navigable stream, was subjected by process in equity to the satisfaction of judgments obtained against it at law in actions of *tort*.

By the laws of Indiana lands and tenements could not be sold under execution, until the rents and profits thereof for a term not exceeding seven years shall have first been offered for sale: but, if that term, or a less one, would not satisfy the execution, then the debtor's estate in the land might be sold. Upon the theory that the tolls were the rents and profits of the bridge, they were sold by one of the judgment creditors, for one year, according to the forms of this law. But the court considering that the bridge in that case was a mere easement, the corporation not owning the fee in the land at either bank of the river, or under the water, found it difficult to say how an execution could attach to either the franchise or the structure of the bridge as real or personal property. * * "One thing however, is plainly manifest," said the court, "that the remedy at law of these execution creditors is exceedingly embarrassed, and we do not see how they can obtain satisfaction of their judgments from this corporation, (owning no corporate property but this bridge) unless equity can afford relief."

And the court held that equity could afford relief, by the appointment of a receiver, to take the possession of the property and the control of the franchise out of the hands of the corporation to which it had been entrusted by special statutory enactment, and thus by what has been often termed an equitable execution (Story Eq Jur., sec. 829), subject the franchise of the corporation to levy tolls upon a bridge across a navigable river to the satisfaction of judgments at law against it for torts

Under the forms of procedure in chancery a natural person or corporation, over whom a receiver is appointed, is required to convey and assign to the receiver, all property, credits, rights or franchises of whatever character to which the receivership applies, and in cases of insolvency or where the rents and revenues of the estate thus subjected to equitable execution are inadequate to satisfy the claims of creditors, the receiver will be directed to sell the whole, or a sufficient portion of the estate so assigned and conveyed to him, to satisfy the claims of complainant creditors; all sales made by him for this purpose being required to be reported to the court for confirmation or disapproval. The order of confirmation is a decree of the court from which an appeal will lie as in the case of James vs. Railroad Company, already referred to; and if unreversed, is binding not only upon parties, but upon all the world until set aside by a direct proceeding for the purpose before the court which rendered the decree.

The practice of appointing receivers over corporations to subject their property and franchises to the payment of their debts, at the suit of creditors of every class, is of constant occurrence in all courts of appropriate jurisdictiction throughout the land. The propriety, upon sufficient cause shown, of courts thus dispossessing corporations of the possession and administration of their property and the exercise and control of their franchises, and transferring them to others, cannot well be questioned now by any member of the profession claiming to be conversant with the general jurisprudence of modern times. And yet we are told that the property right of an indebted corporation in a valuable franchise cannot be subjected to sale under execution, because none other than the original grantees can, except by statutory sanction, be permitted to acquire, control and exercise a franchise granted to a corporation; that a vigilant and enterprising judgment creditor may seize and sell all or any part of the material structure of a railroad company, all its rails and cars and locomotives for what they will bring, severed from the franchise under which alone they can be profitably used for the purposes for which they were constructed; that the value of the franchise itself may by such severance be depreciated and destroyed, but that it is *contrary to* *public policy* to allow the material constructions and the right to use them for the purposes for which they were adapted and designed, which right of use constitutes the main element of their value, to be be sold together for the benefit of all the creditors of the corporation according to their rank and priority, and of the stockholders and corporators where the proceeds of the sale are more than sufficient to pay the debts of the corporation. It is manifest that the right to operate a railroad without a road to operate, and a railroad without a right to operate it, are alike of little value. And yet, by a distinction so nice as to be difficult of perception to any eye not abnormally microscopic, it is said that, for some inscrutable reason of public policy, while you may sell a railroad under execution, by doing so you necessarily sever from the right of property in the road the right to use it for the only purpose to which it is adapted—whithout which right the naked property in the road is of comparatively little value. We submit that the distinction here is too fine for the wisdom of it to be intelligible to railroad men or capitalists or to the great body of those whose lives are devoted to the study, profession and practice of the law.

Nimia subtilitas in jure reprobatur, et talis certitudo certidudinem confundit.

The Supreme Court of Louisiana has repeatedly recognized the validity of the transfer of *corporate franchises* from corporations to individuals. In *Chaffe vs. Ludeling*, 27 A., 607, and *State vs. Morgan*, 28 A., 484, there was an absolute transfer by sale under execution of corporate franchises to natural persons, and the franchises so transferred had been conferred on particular corporations by special statutory enactment.

In Rabassa vs. Orleans Navigation Company, 5 L., 461, the voluntary transfer of a corporae franchise specially conferred by statute on a particular corporation to individuals by lease and sub-lease was recognized by the court as a valid transfer.

So in *Boykin vs. Shaffer*, 13 A., 129, the transfer by the corporation of a similar franchise to an individual for a term of years, was recognized and enforced as a valid contract, although it was specially contended in argument that the corporation did not and could not make such transfer of its corporate franchise.

So in *Gubernator vs. City of New Orleans*, 20 A., 106, where the Carondelet Canal and Navigation Company, a corporation created by special act, transferred all of the franchises conferred upon it by its charter to an individual for a term of years by lease, it was contended that the corporation "had no authority in law to lease or otherwise dispose of its entire corporate property and rights, and to subrogate to all its corporate powers and privileges the plaintiff or other persons." Yet the court recognized and enforced the contract as valid.

In Bowman vs. Walthen, 2 McLean 393, MR. JUSTICE McLEAN said: "It is insisted that a license to keep a ferry is personal and cannot be assigned; that as the right of the defendant, Walthen, rests upon transfers from the original grantees, and has no other foundation, it must be held invalid. In this respect no difference is perceived between a ferry franchise, the franchise of a toll bridge, a turkpike or *railroad*, or any other franchise of the same nature. Certain privileges are given by the State and the grantee becomes bound to afford the proposed public accommodation. It is true, the grant is made in the one case to a private individual, and in the others to corporations. But, as regards any matters of public confidence, it would seem to apply as strongly to the individuals incorporated as to the grantee of a ferry. * * The public can have no claim on the grantee beyond the requirements of the law; *and it is immaterial whether these are fulfilled by the grantee or his assignee.*

When an office is conferred which implies confidence and a capacity to discharge public duties, no assignment could be made of it. But this has no analogy to the assignment in question."

In National Bank vs. Raymond, 29 A., 358, the Supreme Court of Louisiana, held that the franchise or right of collecting market dues could not be severed, by the sale of it under execution, from the right of property in the market.

The impolicy and injustice of allowing a severance of the property from the franchise of a corporation owning and operating a work of public improvement appears to have been fully appreciated by the Supreme Court of the United States in the case to which we shall next refer.

In *Gue vs. Tide Water Canal Company*, 24 How. 262, TANEY, C. J. delivering the opinion of the court said: "The Tide Water Canal is a public improvement situated in the State of Maryland and constructed and owned by a joint stock company chartered by the State of Maryland for that purpose. The canal extends from Havre de Grace in Maryland to the Pennsylvania line; and it is admitted that the property levied on is *necessary for the uses and working of the Canal.*

Upon the matters alleged in the bill and answer several questions of much interest and importance have been raised by the respective parties and discussed in the argument here, But we do not think it necessary to decide them, nor to refer to them particularly, because if it should be held that this property is liable to be sold by a judicial proceeding for the payment of this debt, yet it would *be against equity and unjust to other creditors of the corporation, and to the corporators who own the stock,* to suffer the property levied on to be sold under this *fi. fa.*; and consequently the Circuit Court was right in granting the injunction.

The Tide Water Canal is a great thoroughfare of trade through which a large portion of the products of the vast region of country bordering on the Susquehanna River usually passes, in order to reach tide water and a market. *The whole value of it to the stockholders consists in a franchise of taking toll* on boats passing through it, according to the rates granted and prescribed in the act of assembly which created the corporation. The property seized by the Marshall *is of itself scarcely of any value, apart from the franchise of taking toll, with which it is connected in the hands of the company, and if sold under this fieri facias without the franchise, would bring scarcely anything; but would yet, as it is essential to the workiug of the canal, render the property of the company in the franchise, now so valuable and productive, utterly valueless.*

Now it is very clear that the franchise or right to take toll on boats going through the canal would not pass to the purchaser under this execution. The franchise being an incorporeal hereditament, cannot, upon the settled principles of the common law, be seized under a *fiieri facias.* It it can be done in any of the States, it must be done under a statutory provision of the State; and there is no statute of Maryland changing the common law in this respect. Indeed, the Marshal's return and the agreement of parties shows it was not seized, and consequently *if the sale had taken place, the result would* *have been to destroy utterly the value of the property owned by the company, while the creditor himself would, most probably, realize scarcely anything from these useless canal locks and lots adjoining them.*

The records and proceedings before us show that there were other creditors of the corporation to a large amount, some of whom loaned money to carry on the enterprise, and it would be against the principle of equity to allow a single creditor to destroy a fund to which other creditors had a right to look for payment *and equally against the principles of equity to permit him to destroy the value of the property of the stockholders by dissevering from the franchise property which was essential for its useful existence.*

In this view of the subject the court do not deem it proper to express any opinion as to the right of this creditor, *to some other form of judicial proceedings, to compel the sale of the whole property of the corporation, including the franchise, for the payment of his debt.* * *

If the appellant has the right to enforce the sale of the whole property, including the franchise, his remedy is in a court of chancery, where the rights and priorities of all the creditors may be considered and protected, and the property of the corporation disposed of to the best advantage, and for the benefit of all concerned. A court of common law, from the nature of its jurisdiction and modes of proceeding is incapable of accomplishing this object; and the Circuit Court was right in granting the injunction, and its decree is therefore affirmed."

In Chaffe vs. Ludeling, 27 A., 610, the Supreme Court of Louisiana said:

* * The purchase of Ludeling and his associates conveyed to them all the property of the corporation which was sold by the sheriff. It conveyed to them the privileges and franchises of the corporation, its power to operate the railroad, etc. The sheriff's sale made them owners of the road, its right of way, its property, its franchise, but it did not and could not make them a corporation, for corporations are created only by special act of the Legislature, or by associations under the general law of regulating the mode in which corporations are formed.

This sale conveyed to them the title to the rights and property of the company, but as regards those rights and that property, it made them joint owners thereof, and nothing else. In other words the sheriff's sale to Ludeling and his associates of the property, rights, privileges and franchises of the Vicksburg, Shreveport and Texas Railroad Company, did not make them that company."

The United States Courts, sitting in bankruptcy, have all the jurisdiction and powers of courts of equity. 9 Blatch, 189; 3 Bissel, 452; Deady, 433.

The title relied on by the plaintiff in this cause is derived from the sale in bankruptcy of the assets of the first Canal Street, City Park and Lake Railroad Company, and from mesne conveyances thereunder.

The sale in bankruptcy was a *judicial* sale in the strict sense, as contradistinguished from a sale under execution. The franchises of the company were specifically ordered to be sold, were sold in obedience to the order, and the sale confirmed by a judicial decree, from which an appeal might have been taken, as was done in *Railroad Co. vs. James*, 6 Wallace, 750, before referred to.

In ROREER ON JUDICIAL SALES, a work whose text is sustained by ample citation of authorities, it is said:

Sec. 1. * * A judicial sale is, in contemplation of law, a sale made *pendente lite;* a sale in court, and *the court is the vendor.*

Sec. 2 It matters not to the contrary, that it is made through the instrumentality of a master, commissioner, or other functionary appointed thereto by the court; it is not valid or binding, and confers no right to the property sought to be sold, until confirmed by the court. By such confirmation it *is judicially made the act of the court*, and is therefore a *judicial* sale.

Sec. 3. In the language of the court in *Bozza vs. Rowe*, 30 Illinois, 198—"the master is the mere instrument of the court, acts under its directions and is subject to its control; his acts under the decree, when regular, are considered those of the chancellor." * *

Sec. 5. If the sheriff be appointed by the court, instead of a master or commissioner, to conduct the sale, as in *Minnesota R. R. Co. vs. St. Paul*, 2 Wallace, 609, he sells by virtue of the decree, and not by virtue of his office, and the sale is the sale of the court when confirmed. * *

Sec. 12. In a legal sense, the sale is made *by the court itself*, in enforcement of its own orders and decrees, *wherein is described the property to be sold.* The person who conducts the same is merely the instrument or means used by the court to bring about such executory agreement as the court closes, if satisfied therewith, by final act of confirmation, which makes *the court* the vendor. Such a sale is unlike a sheriff's sale in ordinary common law or statutory execution, which is a *ministerial* and not a *judicial* act, and in making which the law regards the officer, and not the court, as the vendor. * *

Sec. 24. * * It is a general principle that appeals or error may be taken only from judicial acts and decisions. Tested by this general principle, sales under orders and decrees, by persons designated by the court, are eminently judicial.

Sec. 25. Not only the decree or order itself, but also the order of confirmation, which is the very essence of the sale, may be reviewed in an appellate court." * *

No appeal was taken from the decrees ordering and confirming the sale in question in this cause.

None of the parties in interest were aggrieved by those decrees. The second Canal Street City Park and Lake Railroad, as a creditor of which , Delamore asserts whatever rights he claims was not in existence at the time those decrees were rendered, and Delamore does not pretend that he was a creditor of the first company, nor can it be pretended that any rights or interests of his were in any wise affected by the decrees in bankruptcy ordering and confirming the sale of the franchises of the first company.

The jurisdiction of the court under whose decrees the sale in question was made, over the subject matter and the parties, is apparent. Whether the franchises of the bankrupt corporation were liable to be sold to satisfy the debts of the corporation and the liens and mortgages existing against it was a question proper for judicial determination, and it was determined by the bankrupt court in the exercise of its lawful jurisdiction. *Non constat* that the mortgages referred to in the petition for the sale of the property and franchises of the corporation were not such as would have lawfully subjected the franchises to seizure and sale under execution in accordance with the views announced by this court in this case. The court had certainly no right to pronounce the nullity of the sale upon the assumption that they were *not* of that character.

We submit that it was not competent for the Su-Court of Louisiana, on any ground other than a total defect of jurisdiction of the bankruptcy court, to review at all the decrees of that court in the bankruptcy cause For this court certainly can claim no appellate or revisory jurisdiction over that court.

It was not competent, even, for the Supreme Court of Louisina, to review the judgments of courts over which it has had revisory and appellate jurisdiction, except in a direct proceeding for the purpose. It cannot question collaterally the correctness of the decrees of courts subordinate to it, from which no appeal has been taken, or which have not been brought there for review by some other direct proceeding provided by law for the purpose.

In Brosnaham vs. Turner, 16 L., 440, the Supreme Court of Louisiana, declared that where a judgment, execution, and sale are shown, the court will not inquire into the validity of the judgment. In the *succession of Kaizer*, 22 A., 175, the court said: "The sale was made under a formal decree of the proper court and according to the provisions of law. It has been frequently held that, under such sales, the purchaser will be protected."

In *Gray vs. Brignardello*, 1 Wallace, 634, the Supreme Court of the United States say: "It is a well settled principle of law that the decree or judgment of a court which has jurisdiction of the person and subject matter, is binding until reversed, and can not be collaterally attacked. The court may have mistaken the law, or misjudged the facts, but its adjudication, when made, *concludes all the world* until set aside by the proper appellate tribunal. And, although the judgment or decree may be reversed, yet, all rights acquired at a judicial sale, while the decree or judgment were in full force, and which they authorized, will be protected. *It is sufficient for the buyer to know that the court had jurisdiction and exercised it, and that the order on the faith of which he purchased, was made and authorized the sale.* With the errors of the court he has no concern. These principles have so often received the sanction of this court, that it would not have been deemed necessary to reaffirm them, had not the extent of the doctrine been questioned at the bar."

In *Florentine vs. Barton*, 2 Wallace, 216, the same court said: * * In making the order of sale the court are presumed to have judged every question necessary to justify such order or decree. * * The court having the right to decide every question which occurs in a cause, whether its decision be correct or otherwise, its judgment, until reversed, is binding on every other court. The purchaser under such a sale is not bound to look further back than the order of the court, or to inqure as to its mistakes. * * A difierent doctrine would * * render titles under judicicl sales worthless, and a "mere trap for the unwary." These propositions will

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trap for the unwary." These propositions will be found argued at length and fully decided by us in *Grignon's Lessee vs. Astor*, 2 How. 319. Any further argument in vindication of them would be superfluous. '

In *Grignon's Lessee, vs. Astor,* referred to in the opinion in the foregoing case, the court said. * * " The granting the license to sell is an *adjudication upon all the facts necessary to give jurisdiction*, and whether they existed or not is wholly immaterial, if no appeal is taken; the rule is the same whether the law gives an appeal or not; if none is given from the final degree it is conclusive upon all who it concerns. The record is absolute verity, to contradict which there can be no averment or evidence; the court having power to make the decree, it can be impeached only by fraud in the party who obtains it. 6 Pet. 729. A purchaser is not bound to look beyond the decree; if there is error in it of the most palpable kind, if the court which rendered it have, in the exercise of jurisdiction, disregarded, misconstrued or disobeyed the plain provision of the law which gave them power to hear and determine the case before them, the title of a purchaser is as much protected as if the adjudication would stand the test of a writ of error. * *

In *Peck vs. Jenness*, 7 Howard, 624, the Supreme Court of the United States, referring to the jurisdiction of a State Court over an attachment suit pending before it, said: * * "It had full and complete jurisdiction over the parties and the subject matter of the suit; and its jurisdiction had attached more than a month before any act of bankruptcy was committed. It was an independent tribunal not deriving its authority from the same sovereign, and, as regards the District Court, a foreign forum every way its equal. The District Court had no supervisory power over it. * * *

It is a doctrine of law too long established to require citation of authorities, that where a court has jurisdiction it has a right *to decide every question* which occurs in the cause, and that whether its decision be correct or otherwise *its judgment*, until reversed, is regarded *as binding in every other court.*

We ask the court court to compare so much of the opinion of the Supreme Court of Louisiana, as formally declares the nullity of the decrees of the bankrupt court in the bankruptcy of the first Canal Street, City Park and Lake Railroad Company, and of the title derived under those decrees, with doctrines laid down by the Supreme Court of the United States in *Vorhees vs. Bank of the United States*, 10 Peters, 474.

"There is no principle of law," said the court in that case, "better settled than that every act of a court of competent jurisdiction shall be presumed to have been rightly done, till the contrary appears; this rule applies as well to every judgment or decree rendered in the various stages of the proceedings, from the introduction to their completion, as to their adjudication that the plaintiff had a right of action." * * *

A judgment of execution irreversible by a superior court, cannot be declared a nullity by any authority of law if it has been rendered by a court of competent jurisdiction of the parties and the subject matter; with authority to use the process it has issued, it must remain the only test of the respective rights of the parties to it. If the validity of a sale under its process can be questioned for any irregularity preceeding the judgment, it deprives it of all power of regulating its own practice of modes of proceeding in the progress of a cause to judgment. If after its rendition it is declared void for any matter which can be assigned for error only on a writ of error or on appeal, then such court not only usurps the jurisdiction of an appellate court, but collaterally nullifies what such court is prohibited, by express statute law, from even reversing.

If the principle once prevails that any proceeding of a court of competent jurisdiction can be declared to be a nullity by any court after the writ of error or appeal is barred by limitation, every county court or justice of the peace in the Union may exercise the same right, from which our own judgments of processes would not be exempted. * * *

The line which separates error in judgment from the usurpation of power is very definite; and is precisely that which denotes the cases where a judgment or decree is reversible only by an appellate court, or may be declared a nullity collaterally, when it is offered in evidence in an action concerning the matter adjudicated, or purporting to have been so. In the one case it is a record importing absolute verity; in the other, mere waste paper; there can be no middle character assigned to judicial proceedings which are irreversible for error. Such is their effect between parties to a suit, and such are the immunities which the law affords to a plaintiff who has obtained an erroneous judgment or execution. IT WOULD BE A WELL-MERITED REPROACH TO OUR JURISPRUDENCE IF AN INNOCENT PURCHASER WHO HAD PAID HIS MONEY ON THE FAITH OF AN ORDER OF COURT SHOULD NOT HAVE THE SAME PROTECTION AS THE PARTY WHO DERIVED THE BENEFIT ACCRUING FROM IT. * * This great rule, established for the protection of purchasers on the faith of judicial process will be utterly prostrated; encouragement will be given to defendants in judgments, their heirs and privies, to take advantage of the security into which honest purchasers have been lulled; if any judicial proceeding which could stand the test of a writ of error or appeal, or had become irreversible directly, could be avoided collaterally. * *

In *Wheaton vs. Sexton*, 4 Wheaton, 506, the case turned on the validity of the sale of real estate by the marshal of this district, by virtue of an execution, in which the language of the court is: "The purchaser depends on the judgment, the levy and the deed. All other questions are between the parties to the judgment and the marshall." * *

In *Tolmie vs. Thompson*, there had been a sale under an order of the Orphan's Court of this district, which had been *been confirmed* by them. and a deed made to the purchaser, the validity of which was questioned on objections similar to those now under consideration. The court say: "Those proceedings were brought before the court collaterally, and are by no means subject to all the exceptious which might be taken on a direct appeal. They may well be considered judicial proceedings; they were commenced in a court of justice; carried on under the supervising power of the court, and to receive its final ratification. The general and well settled rule of law in such cases is, that when proceedings are collaterally drawn in question, and it appears upon the face of them, that the subject matter was within the jurisdiction of the court, they are voidable only. The errors and irregularities, if any exist, are to be corrected *by some direct proceeding, either before the same court to set them aside, or in an appellate court.* * *

The purchaser is not bound to look beyond the decree when executed by a conveyance, if the facts necessary to give jurisdiction appear on the face of the proceedings: nor to look further back than the order of court. * *

"When a court has jurisdiction it has a right to decide every question that arises in the cause; and whether its decision be correct or not, its judgment until reversed is regarded as binding in every other court." Elliot vs. Piervale, 1 Peters, 240. * *

The principle which must govern this and all other sales by judicial process, are general ones, adopted for the security of titles, the repose of possession, and the enjoyment of property by innocent purchasers, who are *the favorites of the law in every court and by every code.*

Finally, in this connection, we respectfully ask the court to compare so much of the opinion of the Supreme Court of Louisiana in this case as pronounces the nullity of the decrees of the bankrupt court in the bankruptcy of the first Canal Street, City Park and Lake Railroad Company, and of the title derived thereunder to property specifically described in the decrees, and in the act of conveyance made by order and in conformity to the directions of the court, with the doctrines laid down quite recently in *Bledso vs. Erwin*, 33 A. 620, where it was said: "The United States Court was vested with a jurisdiction both at law and in equity over all the matters involved in the transferred suit. It was *competent to determine its jurisdiction over the cause*, and if it assumed jurisdiction it was competent to pass upon the issues which it presented. It has done so. * * This court has no power to review the action and test the correctness of the action of the Circuit Court. It must and does presume that that court has made a sound appreciation of the facts and a correct application of the laws Its action is a perpetual bar."

We respectfully submit that upon the foregoing authorities it is manifest that there is an error in so much of the opinion of the court in this case as pronounces the nullity of the decrees of the United States District Court in the bankruptcy of the first Canal Street, City Park and Lake Railroad Company, in so far as they relate to the sale of the franchises of the company and the nullity of the title derived from said sale; and that the delays for review of the decrees of the bankrupt court by any direct proceeding for this purpose having expired, and no court having the right to review those decrees collaterally, the title derived under said decrees can not now be questioned in any court.

We have shown before that all the corporate franchises of the company were derived, not from any grant by the city of New Orleans, but from the State, and that they were derived from the State not by any special grant but under general laws equally applicable to all, under which any six or more persons may constitute themselves a body corporate for the purpose of constructing, owning and operating a railroad. We have already shown that since 1845, the policy of the State of Louisiana as declared and defined by its constitutions and laws has been against the grant by the State of particular franchises to particular corporations by special legislative action. The constitutions of 1845 and 1864, expressly forbid any such legislative action, and the constitution of 1879 also expressly forbids it. Art. 46 of that constitution declares :

" The general Assembly shall not pass any local or special law on the following specified objects ; * * Creating corporations, or amending, renewing, extending or explaining the charter thereof ; *provided*, this shall not apply to the corporation of the City of New Orleans or to the organization of levee districts and parishes.

Granting to *any corporation*, association or individual any *special* or exclusive privilege or immunity."

How can it be consistently contended that while it is the declared public policy of the State that all franchises for building and operating railroads, etc., shall be acquired under general laws equally applicable to all, such rights when so acquired cannot be tranferred without special legislative sanction although the orignal acquisition of such rights by special legislative action is expressly forbidden ?

But the right, the transfer of which is really in question here, is rather the right of way through certain streets of the City of New Orleans granted by the City Council, than the right to own and operate a railroad which can be acquired by any association of six or more persons who choose to constitute themselves a body corporate for such purpose under the general laws of the State.

The relation between the grantor and grantee of such a right of way is not the relation which exists between the State or sovereign and a corporate body of its creation. It is simply *a contract relation between two bodies politic,* existing under the laws of the common sovereign, the contract itself being one which, by those laws, they are expressly authorized to enter into.

Even in the case of a grant by the sovereign, the doctrine is laid down, in *Dartmouth College vs. Woodward,* 4 Wheat., 418, that "a grant is a contract, and implies an obligation not to reassert the right granted. And a gift of franchises and powers, as distinguished from a gift of property is within the rule. Whether there was any consideration for it moving from the corporation to the grantor of the franchise is immaterial. A gift of a franchise completely executed and accepted by the grantees, becomes irrevocable. But if a consideration were necessary, it may be found in the implied stipulations on the part of the grantees, and in the acts of those who *deal with them on the faith of it.*"

In the present case the first Canal Steet, City

Park and Lake Railroad Company was dealt with and incurred indebtedness to third parties on the faith of the consent of the city to the construction of the road through certain streets; the road was constructed on the faith of the grant, and the company thereafter became so much embarrassed that it was compelled to make a surrender in bankruptcy of all its assets, including the road and the right of franchise to use and operate it for the purpose for which it was constructed; and thereafter the road, with all its appurtent rights and franchises, was sold by order of the bankrupt court to Handy partly for cash and partly on credit, with reservation of vendor's lien and privilege on the property sold; and thereafter the road, with the appurtenant rights and franchises, was by Handy transferred to the second Canal Street, City Park and Lake Railroad Company; and that Company assumed the payment of the credit portion of the price so secured by vendor's lien and privilege; and thereafter in the enforcement of this vendor's lien and privilege, the road with appurtenant rights and privileges, was sold under execution to Schwartz & Brother, without objection on the part of Handy, the second Canal Street, City Park and Lake Railroad Company, Delamore or any other creditor of Handy or of the company.

It is evident that, if there was an existing title to the road and its attendant franchises encumbered either by mortgage or vendor's lien and privilege, that it was not in the power of the city by a new grant of similar franchises to the new company, or of the new company by accepting such grant, *to oust the mortgage or vendor's lien and privilege which had attached to the rights and franchises under the original and still existing grant*, and that a sale of such rights and franchises under execution to enforce such vendor's lien and privilege would pass a valid title thereto to the purchaser, and that the setting up the new grant of the same rights and franchises, as was done by Delamore in seizing and offering it for sale, is an infringement of the prior grant, which ought to be restrained by injunction.

We contend that the consent of the city was not necessary to the transfer of the rights of the grantees under the original grant. Whether it was or not, was not a question at issue between the parties to this suit. If it had been, the plaintiff—the New Orleans, Spanish Fort and Lake Railroad Company—would have shown that the rights asserted by it have been expressly recognized and sanctioned by the City Council of New Orleans in ordinance 5070, A. S., of May 21, 1879, and in ordinance 6275, A. S., of December 31, 1879, which is as follows:

Be it ordained, etc., That whereas, the New Orleans, Spanish Fort and Lake Railroad Company, successor *by purchase* of the rights, franchises, grants and privileges of the late Canal Street, City Park and Lake Railroad Company, has become the owner of the certain portion of ground situated in the square bounded by Bienville, Bernadotte, Conti and St. Patrick streets; * * and whereas, the curve of the tracks of the railroad at the corner of Bienville and Bernadotte streets is abrupt and difficult, the said company is hereby authorized and empowered to alter and change the said tracks and bed of said road so that the same shall run across the portion of ground above described, and to make, under the direction and approval of the City Surveyor, such alterations in the grade of such streets as may be necessary to effect such change; it being, however, understood that nothing shall be done by virtue of this ordinance which shall in anywise interfere with the drainage or free use by the public of said streets.

Be it further ordained, etc., That said company is hereby authorized to remove their track on St. Patrick street, and to lay a double track on Bernadotte from Bienville street to Orleans avenue; provided said railroad company shall keep said Bernadotte street, on which a double track is to be constructed, in good repair from curb to curb; and provided further, that the rails shall be laid in such a manner as to allow free passage of vehicles along and across the rails on Bernadotte street from Bienville street to Orleans avenue; the work to be done under the supervision of the City Surveyor, and to the satisfaction of the Administrator of Commerce and Administrator of Improvements.

Adopted by the Council of the city of New Orleans, December 30, 1879.

Yeas—Behan, Chevalley, Glynn, Isaacson, Marks.

(Signed) I. W. PATTON, Mayor.

A true copy.

(Signed) R. C. WOOD, Secretary.

What is the right of property that the defendant has, as against our right? We say nothing. But admitting, for the sake of argument, that the defendant corporation, in the judgment under which Delamore has taken out execution, the Canal Street, City Park and Lake Railroad Company, has any rights of property, what are they, that can be exercised? Do they own any of the property necessary for the purpose of carrying out their corporate franchise? Have they made any effort to do so? Has any one of their creditors furnished the means to construct, maintain and operate a railroad, the existence and operation of which is necesary to a compliance with a grant of a right of way? Certainly not. Nor is there any evidence in the record that they, or any one who may purchase at the Sheriff's sale, which the Supreme Court of Louisiana, has decided can take place, any intention to construct, maintain and operate a railroad from Canal Street by way of Basin, Bienville, Orleans and other streets, to the Spanish Fort.

If the franchise of the right of way could not be surrendered in bankruptcy and sold under and by virtue of the decree of that court, for the reason that the same was personal and inalienable, then it is evident that such a franchise cannot be seized under execution against the corporation, nor can it be sold in the case of the execution creditor, Delamore—for the thing that cannot be seized, cannot be sold ; the law never permits a vain thing, more especially when the vain thing is to be done for the purpose of fostering litigation, trouble and expense. Yet the Supreme Court of Louisiana has decided that the right of way in the second or Handy company has been seized and can be sold under execution, the decree is that the injunction restraining the sale of the right of way shall be set aside, with a judicial sale necessarily to follow, and this while the court recognizes that the plaintiff, in injunction, did acquire at sheriff's sale the " immovable and other property sold at the bankrupt sale," yet decide that an inalienable franchise can be seized and sold separate from that property, without which the other is of no value.

The whole case put by the Supreme Court of Louisiana admits that the plaintiff, in injunction, is in possession of all the rights, privileges, franchises and property proffered to be to be sold at the bankrupt sale, and has possessed the same for some years without any adverse title having been set up directly by any one having a right to do so.

We are undoubtedly in possession as an owner. We have paid our money for the things we possess. No one having a right to question our title has brought an action to divest us of possession. According to the opinion delivered by the court, the purchaser of the right of way would acquire nothing, and consequently could not divest us of that which we possess. Why give him the opportunity of asserting a pretended right that cannot be maintained, of which the only effect will be to cloud our title to the property we paid for and possess and thus foster unprofitable litigation.

While the matters directly at issue between the parties to this litigation are of comparatively little importance, the Supreme Court of Louisiana, in its opinion, having collaterally questioned the the validity of titles acquired under the decrees of another court, upon the faith of which, under professional advice, hundreds of thousands of dollars have been invested, the undersigned have considered it incumbent upon them to present at length the reasons which in their judgment, should induce the court to maintain the injunction granted by the District Court. They respectfully submit, that they have shown upon principle and authority that there is error in the opinion as delivered, which should be reversed.

ROBERT MOTT,

Of Counsel.

114-501

IN THE

Supreme Court of the United States.

SPANISH FORT RAILROAD CO.,
Pl'ff in Error,

vs.

GEORGE DELAMORE *et al.*

No. 252.
Oct. T., 1884.
Error to Supreme Court
of Louisiana.

Brief for Defendants in Error.

History of the Case.

May 19, 1873.—Under the general law of Louisiana for the organization of corporations for works of public improvement and for other purposes, (R. S., p. 135, *et seq.*,) a charter was granted to the Canal Street, City Park and Lake Railroad Company (herein called Number One) to operate a railroad from Canal street to Lake Ponchartrain and thence along the lake shore, wholly within the limits of the city of New Orleans, and a franchise or right of way accorded by said city. Record, pp. 78, 79; Ordinances, pp. 31 to 35.

This corporation was driven *into involuntary bankruptcy* in the U. S. District Court for the District of Louisiana. The title to the suit No. 1531 completely establishes this fact.

July 14, 1877.—A certain sale was made to one Thomas H. Handy by the order of the Bankrupt Court of "all of the right of way and franchises of said company, the track, bridges, iron," &c., &c. Rec., p. 30. The act is dated January 26, 1878. Rec., p. 35.

January 31, 1878.—Another charter by the same name as the defunct one was formed under the same general law for corporations for the like purpose. Rec., p. 43, at foot; and another right of way and franchise was granted to it by ordinance of city differing in some respects from the first. No. 4523; Rec., p. 50.

August 15, 1878.—To this corporation (called herein Number Two) the purchaser, Mr. Handy, sold what he had acquired at the bankrupt sale, and under the aforesaid order of the U. S.

Bankrupt Court assumed all the obligations of said Handy. Record., p. 19.

But Corporation Number Two failing to comply with the terms of its purchase (so far as appears,) executory proceedings were commenced on one of the mortgage notes given by the purchaser, Handy, by Stratman and the New Albany Rail Mill Company. These proceedings were directed and carried on against Handy exclusively, and the Company Number Two was entirely ignored therein. The right of way and franchises granted the second company by the city were not affected by this sale.

March 8, 1879.—These executory proceedings resulted in a sale of the property conveyed to Handy by the Bankrupt Court, in which sale Schwartz became the purchaser.

March 31, 1879.—The Spanish Fort Railroad Co. was chartered "to operate, &c., a railroad from Canal street, in the city of New "Orleans, to Lake Ponchartrain, and along the lake shore, as "provided for in an ordinance of the city of New Orleans, No. "2264, administration series, and the amendments which have "thereto or may hereafter be made, granting the right to con-"struct and operate said road." Rec., p. 47, *et seq*.

April 9, 1879.—Schwartz transferred to the Spanish Fort R. R. Co. the property, and in terms the purchase also. Rec., p. 41.

October 25, 1879.—Delamore, the defendant in error, who had obtained judgment against the Corporation Number Two, seized on execution the frame building, * * * and on the right of way granted that second corporation by the city by ordinance No. 4523, adopted May 25, 1878. Record, pp. 15, 16, 17, 18, 19.

The questions presented are, *first*, whether the frame building belongs to the plaintiff in error.

Second. Whether the franchises or right of way first granted by the city to Company No. One passed to Handy; next, whether they were transferred by Handy to Company No. Two; and then, whether they or those conferred by Ordinance No. 4523 afterwards passed from it, under the executory proceedings, to Schwartz; and whether they were finally transferred by the latter to the present plaintiff in error, Company No. 3, the Spanish Fort R. R. Company.

The proceedings here began by this Company No. 3 enjoining the execution of Delamore's judgment under which the sheriff had seized and was about to sell the frame building and right of way, the powers, privileges, immunities and franchises conferred by the city of New Orleans on the Company No. Two, the Canal Street, City Park and Lake R. R. Company under Ordnance No. 4523. Rec., p. 18.

The injunction was sustained as to the frame building and dismissed as to the right of way, &c. Rec., p. 91.

The Spanish Fort R. R. (the Company No. 3) prosecute the present writ of error—

I.

This Court is without jurisdiction, because—

1st. No Federal question was involved in this controversy.

2d. No decision involving such question has been rendered. Rec., p. 129.

The judgment herein decides but one single question which in any event is here reviewable; and this is, that the Spanish Fort R. R. Co. has no right, title or interest in the property seized under execution by Delamore, except the frame building; and as to the latter, the judgment is final and conclusive as between these parties. "All we are called upon to determine is whether *the right* "*of way* was or was not acquired by the plaintiff, who has in his "suit asserted title to it That question we answer in the nega- "tive. We wish to be understood as not deciding whether or "not that right of way exists and vests in defendant's judgment "debtor" under Ordnance No. 4523. Rec., p. 91.

The reasoning by which this result is arrived at is as follows:

First. The proceedings in involuntary bankruptcy against Corporation No. One did not operate "the transfer to its creditors the "'*right of way*' granted to it by the city. It did not therefore pass "to Handy at the bankrupt sale. It had reverted to the grantor. "Handy, who had not therefore acquired it, did not encumber, "and did not transfer it to the second corporation, (Number Two,) "which consequently never owned it." Record, p. 91; Opinion.

Second. "The petition for injunction repudiates the idea that "the Corporation No. Two acquired the right of way otherwise "than from Handy, and by him in the bankruptcy proceedings "of the Company No. One." *Ibid.*

Third. The second company and the grantor, the city, deemed the right of way first granted had lapsed, and the seizure was made of such right of way under a franchise given by the city to the second company.

These trains of reasoning are distinct, definite and independent, *in se* and *per se*. The right of way claimed by the plaintiff in error is decreed to have reverted to the grantor, and hence ceased to exist. That, as under Ordinance No. 4523, plaintiffs in error claim nothing, so in regard to it nothing is decided. If the thing generating the Federal question has no existence, it is clear your Honors cannot *create* this thing, and thus grant jurisdiction. Besides, a case may be decided on principles of universal, *i. e.*, *necessary* law, without regard to the *particular* statute of the State or Nation, and then the former cannot be set aside and made to yield to the latter. The regular course of reasoning would otherwise be reversed. Besides, there are steps, grades or degrees of jurisdiction; *e. g.*, appellate jurisdiction is proximate or remote under R. S. U. S., 709, and a metaphysical line divides them. In the former your Honors proceed and decide; in the latter you suspend and dismiss. The present case is remote and on the wrong side of the line, and clearly in the latter category.

II.

The petition herein sets out four ordinances of the city of New Orleans respecting the right of way in controversy; but not one of these grants anything to the Spanish Fort R. R. Co., the Corporation No. Three. "The petition repudiates the idea that the "second company acquired the right of way otherwise than from "Handy, and by him in the bankruptcy proceedings of the first "company."

Under Louisiana law the confessions of a party in a judicial proceeding "amount to full proof against him who has made "them. They cannot be divided against him; they cannot be "revoked, unless proved to have been made through an error in act; they cannot be revoked on a pretense of an error in law." La. Code, Art. 2291.

Hence the demurrer interposed by Delamore (*Rec., p.* 5) might have been sustained and the suit dismissed. This demurrer had been referred to the merits, (*Rec., p.* 6.) A case which in its declaration sets forth no cause of action cannot give jurisdiction under R. S. U. S., 709.

III.

The three ordinances Nos. 2264, 2548 and 3146, (Rec., p. 31, 34, ——,) granting the right of way to Corporation No. One, (an original ordinance with two amendments,) could not coexist with Ordinance No. 4523, for they are inconsistent with it. Hence the Supreme Court of Louisiana say: "The city authorities granted "the second corporation a *similar* right of way, which was *ac*-"*cepted* by it. This acceptance negatives the theory that this "corporation acquired the right of way adjudicated to Handy at "the sale of the assets by the special master." Rec., p. 89. The Company No. Two "did not mortgage for any purpose the fran-"chises or right of way conceded by Ordinance 4523. It could "have mortgaged the franchise, and thus made it liable to "seizure, sale and transfer, if the mortgage had been consented "to,—to secure the payment of *money borrowed for the construction* "*and repairs of the road*. It has not done it, and what was other-"wise done is of no effect." Rec., p. 89.

It is thus seen that the State Supreme Court demonstrates that the property in dispute here never was within the jurisdiction of the Federal bankruptcy court, and has not the slightest connection therewith.

The plaintiff had and has no claim whatever against Company No. Two. Of this company Delamore is a creditor, and as such seized certain property belonging to it. But neither this Company No. Two, nor the State of Louisiana, nor the city of New Orleans, the grantor of the right of way levied on, is a party to this suit, or to the proceedings in bankruptcy. Now, under what theory of law can the plaintiff, who is not owner either by contract or otherwise, interfere in that which does not concern it, to the detriment of the parties to the litigation? If there be any validity or life in the original franchise to the Company No. One, it is not interferred with in any way by the seizing creditor of Company No. Two. Nor is there the slightest foundation for the assertion that the right of way granted by Ordinance 2264 and its amendments is *identical* with that granted by Ordiance 4523. A comparison of the Article XII in both ordinances will show that the city made the reservation of a servitude upon the rights and franchises granted to Company No. Two not provided for in the charter of Company No. One, and there is a *general repealing clause* at the close. Rec., p. 53.

Plaintiffs do not pretend to claim any *exclusive* privilege under their alleged legislative grant of right of way; they are therefore entirely without standing in court to complain that a subsequent statute granted a *similar franchise* to another company.

East Hartford vs. Hartford Bridge Co., 10 Howard, 511.
Turnpike Co. vs. The State, 3 Wall., 210.

IV.

In form this action is identical with that of Van Norden vs. Morton, 99 U. S., 378. The injunction and prayer for $10,000 damages is at law, not in equity; the essence of the suit is legal, not equitable. It is the very common case, by the pleadings, of the seizure of A's property to pay B's debts. On this writ of error your Honors are gravely asked to regard plaintiffs' suit as a *quia timet* bill in equity, and pass upon the rights and interests of persons not made parties to the bill. It is submitted that under neither system, where law and equity are intermixed, or where they are kept strictly isolated and independent, can the essential forms of action be disregarded and human justice be properly administered. Replevin and detinue cannot be tried by a court as cases of injunction, nor a petitory action be converted into an action of jactitation.

V.

A large portion (thirty-six printed pages) of this record is taken up by the able and learned arguments of counsel for plaintiffs in error for a rehearing. (See new rules of Court, No. 10, sec. 7.) That there is no Federal question involved herein and that this writ of error is an afterthought, results inevitably from these arguments. "Plaintiffs' title under bankruptcy proceedings is "not drawn into controversy; its possession thereunder is not the "question. The court below should not, therefore, have raised "and passed upon the issue not presented or suggested by the "pleadings." Rec., 97.

VI.

But, admitting *a. g.* that the pleadings present and that the lower court decided a Federal question giving this Court jurisdiction, the plaintiffs set it forth as follows, (Record, p. 130:)

"The claim of title set up by the plaintiff company under "decree of Federal Court and mesne conveyances has thus been "expressly denied by the Supreme Court of the State, upon the "sole ground that the decree of the Federal Court was and is "void and invalid for the purposes for which it is set up and "relied upon by the plaintiff company."

[What the Supreme Court of Louisiana did decide was simply this: "Whether it (the right of way under Ordnance 4523) was "or was not acquired by the plaintiff, who has in his suit asserted "title to it. That question we answer in the negative."]

This proposed Federal question presents at the very outset a constitutional objection not yet passed on by this Court, as is believed; and this is the entire absence of all legislative power in Congress to include corporations, especially those chartered by the several States and having no inter-state operation whatever, among the classes of persons who can be made bankrupts. The power conferred is: "To establish a uniform rule of naturalization and uniform laws on the subject of bankruptcies throughout the United States." The section evidently refers in both its clauses to natural persons. Corporations are excluded from both. They can neither be naturalized nor made bankrupts. Natural persons not citizens may be naturalized or made bankrupts, but not the purely juridical beings known as corporations.

The legislator seems to have been partially aware of this objection, for he has provided for the bankruptcy of only certain kinds of corporations. *Inclusio unius, exclusio alterius;* and it so happens that the included class claimed to be properly embraced in "the uniform laws on the subject of bankruptcy," is especially excluded from the general statute of Louisiana providing for the organization of railroads. R. S. U. S. 5122 provides for the bankruptcy of "all monied business or commercial corporations "and joint-stock companies," evidently striving to carry out the well-known destructive and commercialising tendency of the railroad era of this country; whilst the Louisiana Revised Statutes, sec. 683, (the railroad act,) provides: "No corporation shall engage in mercantile or in commission brokerage, stock jobbing, "exchange or banking business of any kind."

But if R. S. 5122 be constitutional, and if it constitutionally and legally embraces those railroad corporations, the peculiar creations of the several States, and confined in their operations to particular streets in particular cities of the States, outside of which defined sphere they can have no existence, and having in themselves nothing National or Federal whatever; and if it be further determined that these peculiar State institutions cannot only be made voluntary bankrupts, but forced into involuntary bankruptcy and into assignments of their property (all which, though seemingly acquiesced in by the lower court, is here expressly denied as contrary to the whole spirit and meaning of the Federal Constitution, and especially to its most important amendment, Article X,) then we are brought to the consideration of the doctrine laid down *obiter* by the lower court, but not at all necessary, as seems to be admitted on all sides, for the final decree as found on Rec., p. 89: "The right of way granted " by the city to the first company was not transferred to its cred- " itors. It did not, therefore, pass to Handy at the bankrupt " sale; *it had reverted to the grantor.*"

The proceedings in bankruptcy are involuntary on the part of the Corporation No. One; hence they must have been based on fraud, and on this foundation the company must have been declared *an involuntary bankrupt* From the date of this declaration the rights of all parties must be fixed. In such a case the natural bankrupt becomes civilly dead as to all his property from that date. The juridical bankrupt, the ideal being, must become in like manner civilly dead as to all its property. The human bankrupt's property is ceded to his creditors with the right to sell it, *but with many exceptions.* So, too, the property of the bankrupt corporation. The distinction between the two cases is, that the human bankrupt is by the adjudication only deprived of civil life as to his present property; the *diminutio capitis* is only temporary; the corporation bankrupt is utterly dissolved and annihilated by the adjudication. It has no longer any existence, ideally or actually, and all its vendible property *eo instanti* vests in its assignee and its creditors by operation of law for the purpose of sale and distribution of the proceeds, *but with many exceptions.* Relf vs. Rundle, 13 Otto, 222. The inquiry is thus reduced to the question, what becomes of the right of way granted by the city to the now *dead* corporation? The plaintiffs contend that this right of way vested by the bankruptcy adjudication of Corporation No. One in the assignee in bankruptcy with the right to sell it and distribute the proceeds among the crediors.

It is plain that the bankrupt court proceeded, after it had extinguished all corporate life, exactly as though the dead company were in full life and vigor, and the proceedings were merely in *foreclosure of mortgages*—a commixture of bankruptcy and equity jurisdictions quite hostile to all Federal jurisprudence. What Federal equity courts have been doing in the way of liquidating "question. The court below should not, therefore, have raised "and passed upon the issue not presented or suggested by the "pleadings." Rec., 97.

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Hence the sale of the right of way was taken out of the hands of the assignee contrary to law and placed in the hands of a special master, perhaps with a view of assimilating the practice of a bankrupt court with that of a court of chancery. But no attempt was made to make either the State or the city a party to the proceedings. As to them, at least, the proceedings were void.

Factory Insurance Co. vs. Murphy, 111 U. S., 738.
Ray vs. Norsworthy, 23 Wall., 128.

"The franchise, so termed in this case," says the Louisiana Supreme Court, "is nothing more than a right of way. The franchise proper is the right to become a corporation, and when such "to exist and operate. The right of way is an incident growing "out of such existence. and which determines with the extinction of corporate life. It is a PERSONAL servitude, the exercise "of which was confined to the grantee in default of stipulation "to the contrary, and which is dissolved when the grantee ceases "to exist or forfeits the right to enjoy it." Rev. Civ. Code, 722, 821; Record, p. 90. This opinion is supported by the authority of nine decided cases, (two in this court,) three standard textbooks and several trains of powerful reasoning, on all which defendants in error rely for an affirmance of the judgment, unless the case be dismissed.

Greenwood vs. Railroad, 4 Mor. Trans., 227.

Bankruptcy proceedings are *in rem*, and pertain to the liquidation of a *universitas juris*. As such they stand on an entirely different foundation from judgments *in personam* as to the *res judicata*. A national bankrupt law may for a time invade the family, and go so far as to make minors and married women not public merchants involuntary bankrupts; and, indeed, extend its operations to all corporations and other persons, both natural and juridical, that are *alieni juris*; and under the last and past uniform system this Court would be without the judicial power to redress the wrong—relief ceasing with the *supervisory* jurisdiction of the Circuit Court.

Morgan vs. Thornhill, 11 Wall., 65.
Hill vs. Thompson, 94 U. S., 322.
Lastrapes vs. Landry, 3 Woods, Ct. Ct. 134, dismissed for want of jurisdiction January 6, 1879, by this Court.
See also Cleveland Ins. Co. vs. Ins. Co., 98 U. S., 366.

In the present state of society in England and this country it may be safely asserted that no "uniform laws on the subject of bankruptcy" can be made to embrace persons under authority (*alieni juris*) as minors and married women not public merchants. What corporations may in the U. S. be made bankrupts and their property and franchises sold, has not yet been authoritatively determined. In England, bankrupt laws have always been "anomalous," and in this country their history exhibits them as "extraordinary." We do not understand that corporations are now or ever have been, either in whole or in part, embraced in the bankrupt laws of the former country. Certain it is that the recent English bankrupt law of 1883 expressly excludes corporations from its provisions. The slackest dragoman of the Constitution has not yet made claim that the Federal judicial power can force the surrender of all the franchises of a strictly State corporation and the sale thereof by a special master or assignee under orders of the bankrupt court, even though the corporation be a commercial corporation.

But all corporations are under disability, and their *status* is irrevocably fixed by the law establishing them. They can be born only under this law, and under this law alone can they exist and die. All their powers are conferred by the Legislature. Only as to these powers are they *sui juris*. The State of Louisiana has never accorded the right to any of her private corporations to stand in judgment as defendant in either voluntary or involuntary proceedings in bankruptcy, either under Federal law or under her own system of laws. On the contrary, she has provided quite other and different modes for the liquidation and dissolution of her corporations; but the *cessio bonorum* is not one of them.

Jeffries vs. Iron Works, 15 La. An., 19; 18 Ib., 685.
Holdane vs. Sumner, 15 Wall., 600.
La. Code, Article 447.

Hitherto questions of *status* have been considered as peculiarly within the sphere of State jurisdiction, and it has also been supposed that neither minors nor married women not public merchants could legally be made involuntary bankrupts under Federal law. For like reasons corporations should also be excluded, or the law restricted to Federal corporations, and especially to those within the District of Columbia and other territories of the United States. "Forms are measures of the powers of corporations." Paul vs. Virginia, 8 Wall., 183, where the opinion is clear that not even the commerce clause of the Constitution embraces corporations.

If the bankruptcy clause of the constitution can be extended to some corporations and made to embrace *a street railroad*, then the next question calling for solution is, Whether the said corporation can be made an *involuntary* bankrupt under any possible clause of the bankrupt act? A party relying upon a sale made by a U. S. Bankrupt Court in the *involuntary* bankruptcy of *a street railroad*, is bound to show the jurisdiction of the court. The corporation stands on the same ground as a married woman or a minor.

VII.

It is admitted here on all sides that some franchises may be *sold* and that some cannot; that some may be *mortgaged* and some cannot; and that the right of way, if one of the franchises, may be thus mortgaged and sold *if* the legislature has specially conferred this authority on the corporation. Here the legislature has said to the railroads you may, "to secure the payment " of any obligation contracted for the construction of the road, " mortgage it, * * * and such mortgage may also be " made to bind the appurtenances of said road, its warehouses, " depots, water-stations, locomotives," &c. Act of 1855. Rev. Stat., p. 142, sec. 726. And by act of 1856, R. S., p. 136, sec. 692, it says: You " may borrow from time to time such sum of " money as may be required for the construction or repairs of " your railroad, and for this purpose may issue bonds or your " (their) obligations, secured by mortgage on the franchises and " all the property of said company," &c.

It is not pretended that Company No. One ever mortgaged *more* than what was authorized under the act of 1855, or ever borrowed money and issued bonds by *mortgage upon the franchises*, and the record is entirely silent on the subject. See opinion, Rec., p. 89, at foot, La. Stats., 1880. No. 13, p. 19 The prior statutes were reviewed in Morgan *vs.* Livingston, 93 U. S., 217.

What Handy bought from the special master and paid $25,000 for the right of way, appurtenances, miscellaneous property, real estate, $2,450 for three dummies, and $1,000 for two cars and one iron tank, (Rec., p. 36, *et seq*,) together, $28,450. Handy sold to the Company Number Two, seven months subsequently, for $90,848.49. (Rec., p. 21.)

What Schwartz bought on the executory process against Handy for $6,500, (Rec., p. 69, sheriff's sale,) Schwartz sold to the Spanish Fort R. R. Co. No. Three for $50,000. (Rec., p. 41.)

But Handy when he sold, sold for $71,881.82 in the full paid up shares of the said C. S., C. P. and Lake R. R. Company No. Two, the purchaser.

And Schwartz, when he sold for $50,000 to Company No. Three, took full paid up capital stock of said company in payment. (Rec., p. 43.)

We are reminded of the Leviathan's apologue—"Let me be " quickly rich! Let the stream be deep and rapid!"

If we admit *a. g.* that the bankruptcy proceedings were all valid, and that Handy by his purchase acquired the right of way and all the franchises and property of Company No. One, and lawfully sold them just as he had bought them to Company

No. Two, that thus legally acquired them, having already obtained another right of way under ordinance No. 4523, we then are bound to inquire, under the *pact de non alienando*, what becomes of the privilege of the vendor when he takes full paid shares of the new company in payment. Handy transfers "with "such title as was conveyed to him, with full substitution and "subrogation," &c., and the company assumes the payment of Handy's notes at one and two years, each for $9,483.33, with *mortgage*, "which is hereby assumed by the purchaser." As between the parties all this looks plain enough. But Delamore is a creditor of Company No. Two and a third person to all the proceedings, which, as to him, are *res inter alios acta*.

Handy only retained a mortgage on what he sold, and reserved in his act of sale no vendor's privilege. But according to English equity, and *á fortiori*, under Louisiana law and jurisprudence, both vendor's privilege and special mortgage would *disappear* in a sale for paid up shares of the new Company No. Two.

In the present case, while the Company No. Two was *the third possessor* of the property sold to it by Handy, and assumed the payment of his two notes given for the credit portion of the price of the property sold by order of the bankrupt court, yet this assumption, with its vendor's privilege and special mortgage, was never accepted or acted on,—but expressly ignored and repudiated by the holders of the notes when they issued their executory process against Handy. (Record, p. 60.) At this moment they had the election of holding Company No. Two responsible for their notes, or, in virtue of their clause *de non alienando*, of treating the sale by Handy to this Company No. Two as absolutely void. They chose the latter course. *Electâ unâ viâ non datur recursus ad alteram.*

Thus admitting *a. g.* that Schwartz and the plaintiff in error are legitimate successors in the title to the first right of way, they have not and cannot by any possibility have any right, title, or interest to that right of way which the city of New Orleans conferred on Company No. Two by ordinance No. 4523. "If I have a title to real or personal property, no person can "withhold it from me upon the simple allegation that it is of no "value."

CHARLES W. HORNOR,
For Self, and

WM. S. BENEDICT,
For Defendant in Error.

WASHINGTON, D. C., *March* 16, 1885.

114-501

SUPREME COURT
OF THE UNITED STATES.
No. 252.

THE NEW ORLEANS, SPANISH FORT AND LAKE RAILROAD COMPANY,

PLAINTIFF IN ERROR,

vs.

GEORGE DELAMORE, ET AL.,

DEFENDANTS IN ERROR.

ADDITIONAL BRIEF.

ROBERT MOTT,
Of Counsel.

SUPREME COURT

OF THE UNITED STATES.

No. 252.

THE NEW ORLEANS, SPANISH FORT AND LAKE RAILROAD COMPANY,

PLAINTIFF IN ERROR,

vs.

GEORGE DELAMORE, ET AL.,

DEFENDANTS IN ERROR.

ADDITIONAL BRIEF.

Since the brief of the plaintiff in error was prepared and filed, two cases have been decided, which have a bearing on this case, and they are :

1st.—The Memphis & L. R. R. Co., vs. Berry, decided by the Supreme Court of the United States at the present term, reported in the Supreme Court Reporter, Vol. V., part 8, 23d January, 1885, pages 299 et seq., where it was held that x

The sale of the property mortgaged being the charter and property of the corporation, did not transfer or convey the corporate right to exist, but

x See S.C. as Memphis R R Co vs. Commissione
112 U.S.R. p 629 — also Atkinson vs. Mc

did convey the right to own and use the railroad and right of way, and the right to form another corporation to use these:

2d.—The succession of Macias, decided by the Supreme Court of Louisiana, and reported in the Reporter, 21st of January, 1885, p. 78, where it was decided, that

A sale of succession property made at the instance of creditors under an order of court, to pay debts is a judicial sale, and the purchaser, when it appears that the court was of competent jurisdiction, is not bound to look beyond the decree, recognizing its necessity.

The opinion in this case, we have printed and appended hereto.

Respectfully submitted,

ROBERT MOTT,

Of Counsel.

APPENDIX.

SUCCESSION OF ELIZA P. MACIAS, OCTAVE ANFOUX THOPHILE ANFOUX AND DELPHINE IMBERT, INTERVENORS.

APPEAL FROM THE CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS.

MR. JUSTICE POCHE.

This appeal brings up a rule by a purchaser at a judicial sale of succession property for possession of said property, which is withheld from him by O. Anfoux in actual possession of the same.

In the latter's answer to the rule he is joined by Theophile Anfoux, executor of the succession, and by Delphine Imbert, who charge nullity of the judgment ordering the sale at which the plaintiff in the rule, became a purchaser; on the main ground that the same property had been previously sold and adjudicated to Delphine Imbert, which sale had been made under the order of the same court, but had not been completed on account of the auctioneer's illegal refusal to perfect her title.

Alleging her readiness to comply with the terms of the adjudication to her, Delphine Imbert urges that O. Anfoux is her keeper under her alleged title and together with the executor who joins in her defense, she resists the rule of possession.

The rule was maintained, and the Intervenors have appealed. The record shows that the succession property was offered for sale at the instance of creditors under an order of the court for the purpose of paying the debts of the succession, and was at the first offering adjudicated to the intervenor, Delphine Imbert, who is represented in the the auctioneer's return as having failed to comply with the terms of her bid.

On a petition of a creditor reciting these facts, the court issued a second order for the sale of the succession property.

At the offering made thereunder, the property in question was adjudicated to the plaintiff in this rule, to whom the auctioneer executed an authentic act of sale.

In their efforts to assail the latter's title and to defeat his demand for possession of the property thus acquired by him, Intervenors are met with a judgment of a court of competent jurisdiction ordering the sale of the property in contest, and they had to encounter the well established rule of our jurisprudence which protects a purchaser in good faith at a judicial sale made under the orders of a court of competent jurisdiction.

In addition to the grounds of nullity hereinabove stated, their main contention is that in the proceedings which resulted in the second offering of the property, the executor was not made a party, and that he was a necessary party.

To this a ready answer is that the executor is always before the court, and that he must be legally held as cognizant of all proceedings affecting the succession which he represents. Hence it is, that Article 990 of our Code of Practice authorizes the sale of succession property to pay debts at the instance of creditors without the mention of the representatives of the estate, and that Article 992 applies those rules to all successions administered by administrators.

It is therefore apparent that the court had jurisdiction in the premises, and that the proceedings contained all the elements of a valid judgment. Beyond this, the purchaser had no other inquiry to make. A purchaser at a sale made under such a judgment is not bound to look beyond the decree recognizing its necessity. No rule in our jurisprudence rests on more solid ground, or is sanctioned by more abundant direct authority. Nesson vs. Weis et al., 34 An., 1010: Duckworth vs. Vaught, 27 An., 599: Succession of Vaulu, 26 An., 150: Wright vs. Cummings, 9 An., 353: Succession of Gurney, 14 An., 622: McCullough vs. Minor, 2 An., 466: Lalarue & Hiess vs. Moreau, 13 La., 431: Pintard vs Deyris, 3 U. S., 32.

The issue tendered by Intervenors involves defects and irregularities which all preceded the judgment under which the sale was effected, hence it can not be tried under these proceedings.

Judgment affirmed.

114-511

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. 217.

STEPHEN B. STURGES, PLAINTIFF IN ERROR,

vs.

MERCHANT CARTER, TREASURER OF RICHLAND COUNTY, STATE OF OHIO, SUCCESSOR IN OFFICE TO JOHN A. LEE, TREASURER.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO.

FILED MAY 31, 1882.

SUPREME COURT OF THE UNITED STATES.

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IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO.

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1 *Pleas.*

Pleas in the circuit court of the United States for the northern district of Ohio, eastern division, held at the United States court rooms, in the city of Cleveland, in the district aforesaid, before the Honorable John Baxter, circuit judge, for the sixth circuit, and the Honorable Martin Welker, district judge for the district aforesaid, on the 29th day of November, being a day of the October term of said court in the year of our Lord one thousand eight hundred and eighty-one, and in the one hundred and sixth year of the Independence of the United States of America.

AUGUSTUS J. RICKS, *Clerk.*

2 *Precipe.*

In the Circuit Court of the United States for the Northern District of Ohio.

JOHN A. LEE, Treasurer of Richland County, Ohio, Plaintiff,
vs.
STEPHEN B. STURGES, Defendant,
No. 3809.

Judgment in favor of Merchant Carter, treasurer for the time being of Richland county, Ohio, successor to rights of plaintiff in above case, against Stephen B. Sturges, defendant, at the October term, A. D. 1881, of said circuit court for $10,727.65 damages, penalty, and interest, and $——— costs.

Please issue a writ of error to said circuit court against said Merchant Carter, treasurer of Richland county, Ohio, at the suit of said Stephen B. Sturges, returnable to the Supreme Court of the United States on the first day of the next term thereof, according to law and the rules of said Supreme Court.

DIRLAM AND LEYMAN,
Attorneys for Plaintiff in Error, S. B. Sturgis.

To the clerk of the circuit court of the United States for the northern district of Ohio.

3 *Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States for the northern district of Ohio, eastern division, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court before you, between Merchant Carter, treasurer of Richland county, Ohio, as successor in office to John A. Lee, treasurer, &c., plaintiff, and Stephen B. Sturges, defendant, a manifest error hath happened to the great damage of the said Stephen B. Sturges, as by his complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct 4 that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the 27th day of December, in the year of our Lord one thousand eight hundred and eighty-one.

[SEAL.] AUGUSTUS J. RICKS,
Clerk of the Circuit Court of the U. S., N. D. O.

Return of Writ of Error.

UNITED STATES OF AMERICA, *Northern District of Ohio:*

I, Augustus J. Ricks, clerk of the United States circuit court within and for said district, do hereby certify that in obedience to the command of the within writ of error the court has duly searched the record and proceedings of the said court in the cause aforesaid, and now herewith transmits to the Supreme Court of the United States a full and complete transcript thereof.

In witness whereof I have hereunto set my hand and affixed the seal of said circuit court, at office in the city of Cleveland, this 17th day of January, A. D. 1882.

[SEAL.] AUGUSTUS J. RICKS, *Clerk.*

5 The United States of America, to Merchant Carter, treasurer of Richland county, State of Ohio, successor in office to John A. Lee, treasurer, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the eastern division of the northern district of Ohio, wherein Stephen B. Sturgis is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Martin Welker, district judge, sitting as one of the judges of the circuit court in and for said district, this tenth day of January, in the year of our Lord one thousand eight hundred and eighty-two.

M. WELKER,
District Judge, &c., N. D. O.

5½ The undersigned, Merchant Carter, as successor in office to John A. Lee, and treasurer of Richland county, Ohio, mentioned in the within citation, hereby acknowledge service of the within citation upon me this 13th day of January, A. D. 1882.

MERCHANT CARTER,
Treasurer of Richland County, Ohio.
By JENNER & TRACY,
His Att'ys.

6 *Transcript from Common Pleas Court.*

In the Court of Common Pleas of Richland County Ohio.

Transcript of all the pleadings, processes, and proceedings had in said court of common pleas in the case of John A. Lee, treasurer of Richland county, Ohio, plaintiff, and Stephen B. Sturges, defendant.

JOHN A. LEE, Treasurer of Richland County, Ohio, Pl'ff,
vs.
STEPHEN B. STURGES, Def't.
} Civil Action.

Be it remembered that heretofore, to wit, on the seventeenth day of August, A. D. 1878, the plaintiff herein by Jenner and Jenner, his attorneys, filed in the clerk's office of the court of common pleas of Richland county his petition against the defendant herein, which petition is in the words and figures following, to wit:

Petition.

Court of Common Pleas of Richland County, Ohio.

JOHN A. LEE, Treasurer of Richland County, Ohio, Pl'ff,
vs.
STEPHEN B. STURGES, Def't.

The said plaintiff, John A. Lee, says that he is the duly 7 elected, qualified, and acting treasurer of the county of Richland and State of Ohio, and he further says that there stands charged upon the tax duplicate of said county, against said Stephen B. Sturges, for personal taxes, the sum of ten thousand seven hundred and seventy-six and $\frac{83}{100}$ ($10,776.83) dollars, together with the penalty thereon, amounting to the further sum of $1,077.68, being ten per cent. on said first-named sum, as provided by law.

Plaintiff further says that the said taxes and penalty are due and unpaid, and that said defendant, Stephen B. Sturges, is indebted to plaintiff as such treasurer, in said sum of $11,854.51, so appearing to be due on said duplicate.

Wherefore plaintiff prays judgment against said defendant for said sum of eleven thousand eight hundred and fifty-four and $\frac{51}{100}$ ($11,854.51) dollars, together with costs of suit and interest on said $11,854.51 from the 15th day of August, 1878.

JENNER AND JENNER,
Attorneys for Plaintiff.

STATE OF OHIO, }
Richland County, } *ss:*

John A. Lee, being duly sworn, says that he is the treasurer of Richland county, Ohio, plaintiff herein, and that the facts and allegations contained in his foregoing petition are true as he believes.

JNO. A. LEE.

8 Sworn to before me, and subscribed in my presence this 16th day of August, 1878.

THOS. T. DILL, *Clerk.*

And afterwards, to wit, on the 17th day of August, A. D. 1878, a summons was issued herein to the sheriff of Richland county, Ohio, and which summons is in the words and figures following, to wit:

Summons.

THE STATE OF OHIO, }
Richland County, } *ss:*

To the sheriff of the county of Richland:

You are commanded to notify Stephen B. Sturges that he has been sued by John A. Lee, treasurer of Richland county, Ohio, in the court of common pleas of Richland county, and unless he answers by the 14th day of September, A. D. 1878, the petition of said plaintiff against him, filed in the clerk's office of said court, such petition will be taken as true, and judgment rendered accordingly.

You will make due return of this summons on the 26th day of August, A. D. 1878.

Witness Thos. T. Dill, clerk of said court, and the seal thereof, at the city of Mansfield, this 17th day of August, A. D. 1878.

THOS. T. DILL, *Clerk.*

Said summons is endorsed as follows: "Sum demanded, $11,854.51, andinterest from August 15, 1878."

And afterwards to wit, on the 24th day of August, A. D. 1878, 9 said sheriff returned said summons endorsed as follows:

Sheriff's Return.

THE STATE OF OHIO, }
Richland County, } *ss:*

Received this writ August 17th, A. D. 1878, and pursuant to its command I served the same Aug. 24th, A. D. 1878, on the within-named defendant by leaving at his usual place of residence a true certified copy of this writ with the endorsements thereon, and I return this writ this 24th day of Aug., A. D. 1878.

JAMES RITCHIE, *Sheriff,*
By G. G. DICKSON, *Deputy.*

And afterwards, to wit, on the ninth day of September, A. D. 1878, the defendant herein, by Dirlam and Leyman, his attorneys, filed in the clerk's office aforesaid his motion herein, which motion is in the words and figures following, to wit:

Motion.

In the Court of Common Pleas of Richland County.

JOHN A. LEE, Treasurer, Plaintiff,
vs.
STEPHEN B. STURGES, Defendant.

Now comes the defendant and moves the court for an order requiring the plaintiff to separately state and number his several causes of action.

2nd. That the plaintiff be required to make his petition more definite, by stating the facts which he claims entitles him to recover the penalty therein sued for.

DERLAM AND LEYMAN,
Att'ys for Def't.

10 And afterwards, at the September term, to wit, on the 16th day of September, A. D. eighteen hundred and seventy-eight, came the parties, and this cause came on to be heard, upon the motion on file, to separately state the cause of action, and make more definite and certain, and was argued by counsel, upon consideration whereof, and the court being fully advised in the premises, do overrule said motion, to which ruling in overruling said motion the defendant at the time excepted.

And afterwards, to wit, on the sixteenth day of September, A. D. eighteen hundred and seventy-eight, the defendant, by his attorneys, filed in the clerk's office aforesaid his demurrer herein, which is in the words and figures following, to wit:

Demurrer.

In the Court of Common Pleas of Richland County, Ohio.

JOHN A. LEE, Treasurer of Richland County, Ohio, Plaintiff,
against
STEPHEN B. STURGES, Defendant.

The defendant, Stephen B. Sturges, demurs to the allegations of said petition charging him with ten per cent. penalty upon said tax, because said petition does not state facts sufficient to enable the plaintiff to recover from this defendant said ten per cent. penalty.

DERLAM AND LEYMAN,
Att'ys for Defendant.

11 *Journal Entry.*

And afterwards, at the September term, to wit, on the twenty-fifth day of September, A. D. eighteen hundred and seventy-eight, came the parties, and this cause on to be heard upon the demurrer to that portion of plaintiff's petition relative to the recovery of ten per cent. penalty, and was argued by counsel, whereupon the court being fully advised in the premises, do overrule said demurrer, to which ruling the defendant at the time excepted.

Thereupon this cause is continued, with leave for defendant to answer in thirty days after the adjournment of this term.

And afterwards, to wit, on the fifteenth day of November, A. D. 1878, the defendant, by his attorney, filed in the clerk's office aforesaid his answer herein, which is in the words and figures following, to wit:

Answer.

In Court of Common Pleas of Richland County, Ohio.

JOHN A. LEE, Treasurer of Richland County, Plaintiff,
against
STEPHEN B. STURGES, Defendant,

For answer to the plaintiff's petition defendant says: That of the sum sued for in this action is the tax upon Western Union Telegraph stocks of the value of $100,000, claimed to have been owned by defendant in the year 1874, for which $2,070, and a penalty thereon of ten per cent., is claimed in this suit.

Defendant further says that for said year 1874 he listed his
12 personal property for taxation to the assessor of the 1st ward
of the city of Mansfield, Richland county, Ohio, where he then resided. That the amount of personal property so listed by him was $2,520.00, and was by said assessor duly returned to the auditor of said county, and duly placed upon the tax duplicate, and taxes assessed thereon upon said duplicate for the sum of $52.16, which sum of $52.16 this defendant then fully paid to the treasurer of said county, and took his receipt therefor, and that said taxes, upon said duplicate for the year 1874, have been fully cancelled and paid as shown by said duplicate.

That there is not now, nor ever has been, listed or charged against this defendant, upon said tax duplicate for the year 1874, any other or further sum or sums whatever, nor has any other or further property of any kind whatever been listed, returned, or placed upon said tax duplicate for taxation against this defendant, and at the time of the commencement of this suit no taxes stood charged against defendant upon the tax duplicate of said county for the year 1874; whereas to so much of said cause of action as is for tax and penalty for the year 1874 he prays judgment.

Second. Defendant says that of the sum sued for in this action a portion thereof is a tax upon Western Union Telegraph stock claimed
to have been owned by defendant in the year 1875, of the
13 value of $100,000.00, and credits to the amount of $35,000.00
in all for that year, the tax on personal property of the value of $135,000.00, for which taxes are claimed to the amount of $2,823.38, with ten per cent. penalty thereon.

Defendant says for the year 1875 he listed his personal property for taxation to the assessor of the first ward of the city of Mansfield, Richland county, where he then resided, at the sum of $2,550.00. That his said personal property was duly placed upon the tax duplicate of said county for the year 1875, at said sum of $2,550.00, and taxes for that year assessed thereon at $53.30. That he then paid to the treasurer of said Richland county said sum of $53.30, and took his receipt therefor, and upon said tax duplicate for said year said tax is shown to have been fully paid. There does not now stand, nor since has there stood, charged against him upon the tax duplicate of said county for the year 1875 for taxes on personal property for any sum whatever. He therefore prays that as to said taxes for the year 1875, and the penalty thereon, he may be dismissed, with his costs.

Third. Defendant says that of the sum sued for is the tax upon Western Union Telegraph stock of the value of $100,000.00 claimed to have been owned by defendant in the year 1876, and $41,000.00 of credits claimed to have been owned by him for that year; in all $141,000.00, with a penalty thereon of ten per cent., in all
14 of the sum of $2,977.00, and ten per cent. thereon. Defendant says that for said year 1876, he duly listed his personal property for taxation to the assessor of the first ward of the city of Mansfield, Richland county, at the sum of $2,100.00. That said sum was placed upon the tax duplicate for said county for that year, and taxes assessed against him thereon in the sum of $44.31, which last-named sum he then paid, and took the receipt therefor from the treasurer of Richland county. That said tax appears upon said duplicate duly paid and satisfied. That there was not at the time of the commencement of this suit, nor since has been, any tax or penalty charged against him on the tax duplicate of said county for the year 1876.

Whereupon he prays judgment against the plaintiff as to so much of said cause of action as consists of taxes and penalty for the year 1876.

Fourth. Defendant says that said cause of action against him is for taxes and penalty on person property for the years 1874, 1875, 1876, and 1877, in the aggregate $10,776.83, and penalty thereon of ten per cent., of which sum $2,906.45, and penalty thereon of ten per cent. is for pretended taxes and penalty for the year 1877. That a portion of said tax purports to have been assessed upon Western Union Telegraph stock of the value of $100,000.00, and the residue upon credits of the value of $41,000.00.

15 Defendant says that for the year 1877 he listed his personal property for taxation at the valuation of $1,920.00 to the assessor of the first ward of the city of Mansfield, in said county; that said personal property was duly placed upon the tax duplicate of said county for taxation at said valuation, and taxes duly assessed thereon to the amount of $39.55 for said year 1877. That the defendant then paid said sum to the treasurer of Richland county, and took his receipt therefor, and said taxes appear upon said tax duplicate fully paid and cancelled.

Defendant further says that the assessor of the first ward of the city of Mansfield, county of Richland, for each of the years 1875, 1876, and 1877 returned to the auditor of Richland county, as listed by defendant, a list of the personal property of defendant for taxation, according to law upon regular tax lists; that for each of said years said personal property was duly entered upon said tax duplicate of said county for each of said years, respectively; the taxes were each year duly assessed thereon, and were all paid when they became due by defendant.

That said tax-list- so returned to said auditor still remain unchanged, and no correction has ever been made or attempted thereon, nor did said auditor at any time notify this defendant of his intention to make an entry upon or change or correct said tax-lists so returned to him, filed with him by said assignee, or that he intended to enter upon the tax duplicate of said county any
16 further sum of taxes against the defendant for either of said years.

That said pretended cause of action is for taxes wrongfully placed upon the tax duplicate of said county for the year 1877 by the auditor of said county, contrary to law. That said taxes were so placed upon said duplicate in the month of September, 1878, after the taxes for said year had been duly paid by defendant, and without notice to defendant, and without his having an opportunity of showing that his statement and the return of said assessor were correct.

Fifth. Defendant says during the years 1874, 1875, 1876, and 1877, although he was a resident of first ward of the city of Mansfield, he carried on business in the city of New York, in the State of New York, and there, in person and through his agents, bought and sold stocks. That of the taxes and penalty for which this suit is brought $9,157.00 taxes and $1,915.70 penalty is for taxes and penalty upon $100,000.00 in value of the capital stock of the Western Union Telegraph Company, claiming to have been owned by defendant during the years 1874, 1875, 1876, and 1877, which stock, nor any part thereof, was ever in the State of Ohio, but certificates were issued therefor by said Western Union Telegraph Company and purchased by defendant in said city of New York, and there kept and used in his said business. That the said Western Union Telegraph Company is an incorporated telegraph company under the laws
17 of the State of New York, but said New York corporation transacts a large portion of its business in the State of Ohio by transmitting to, from, through, and in said State telegraphic messages, and has a large portion of its property and capital located in the State of Ohio. That said corporation for all of said years 1874, 1875, 1876, and 1877 paid taxes upon its property and capital in the State of New York, and for each and all of said years paid taxes in the State of Ohio upon its property and capital in said State, and, in addition to the payment of taxes upon its property and capital in the State of Ohio, paid taxes upon all the gross receipts of its business in said State, which taxes so paid amounted to the sum of $——.

Defendant says that said Western Union Telegraph Company during all of said years 1874, 1875, 1876, and 1877 were required to list and return its capital and property for taxation in the State of Ohio, and did so list and return its capital and property in said State, and duly paid the taxes thereon, and that the value of said capital and property so listed in said State by it was much greater than all the certificates of its capital stock owned or held by residents of the State of Ohio.

Defendant says that he did not own any of the cause of action sought to be recovered as penalty; that no penalty has ever accrued upon said taxes so placed upon said duplicate in September last.

DIRLAM AND LEYMAN,
Defendant's Attorneys.

18 THE STATE OF NEW JERSEY, } *ss:*
County of Bergen, }

Stephen B. Sturges, being duly sworn according to law, deposes and says: That he is the defendant above named; that the facts stated and allegations in this his foregoing answer are, as he believes, true.

STEPHEN B. STURGES.

Sworn to before me and subscribed in my presence, this eleventh day of November, A. D. 1878.

RUFUS A. GORHAM,
Commissioner of Deeds in and for the County of Bergen.

STATE OF NEW JERSEY, } *ss:*
Bergen County, }

I, Thomas W. Demorest, clerk of the county of Bergen, and also clerk of the circuit court and court of common pleas (courts of record), do hereby certify that Rufus A. Gorham, Esq., whose name is subscribed to the certificate of the proof or acknowledgment of the annexed instrument, and thereon written, was at the time of taking such proof or acknowledgement a commissioner of deeds in and for said county, dwelling in the said county, and duly sworn and authorized to take the same; and, further, that I am well acquainted with the handwriting of the said Rufus A. Gorham, and verily believe that the signature to the said certificate of proof or acknowledgement is genuine.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court and county, the 11th day of November, A. D. 1878.

[SEAL.] THOMAS W. DEMOREST, *Clerk,*
By W. S. DOREMUS, *Dept. Clerk.*

19 And afterwards, to wit, on the second day of December, A. D. eighteen hundred and seventy-eight, the defendant herein, by his attorneys, filed in the clerk's office aforesaid his petition for removal of this cause to the next circuit of the United States of the northern district of Ohio, which petition is in the words and figures following, to wit:

Petition for Transfer of Suit to Federal Court.

In the Court of Common Pleas of Richland County, State of Ohio.

JOHN A. LEE, Treasurer of Richland County, Plaintiff,
vs.
STEPHEN B. STURGES, Defendant.

To the honorable the court of common please of Richland county, State of Ohio:

Your petitioner, Stephen B. Sturges, respectfully shows that he is defendant in the foregoing entitled suit, and that the same was commenced against him on or about the 17th day of August, A. D. 1878, in said court of common pleas for said county. That your petitioner now is, and has been since the 23rd day of September, A. D. 1878, a citizen and resident of the State of New Jersey. Your petitioner further shows that there is, and was at the time said suit was brought, a controversy therein between your petitioner and the said plaintiff, John A. Lee, treasurer of Richland county, State of
Ohio, who is, and then was, a citizen of the State of Ohio
20 and a resident thereof.

That said county of Richland, of which the said John A. Lee is treasurer and for whose benefit said action is prosecuted against your petitioner, is a county of the State of Ohio. That said action was brought by the said John A. Lee, treasurer of said county, for the purpose of recovering against your petitioner $11,854.51 and interest from August 15th, 1878, claimed as taxes and penalty due said John A. Lee, treasurer of Richland county, State of Ohio, from your petitioner; the matter of dispute in this suit exceeds the sum of five hundred dollars exclusive of costs.

Your petitioner further represents that this suit has not been tried, but is now pending for trial in the court of common pleas of Richland county, State of Ohio. That the December term of said court of common pleas of Richland county, A. D. 1878, is the first term of said court at which said cause could be first tried, and your petitioner desires to remove the same into the circuit court of the United States for the northern district of Ohio, in pursuance of the acts of Congress in such cases made and provided.

Your petitioner further says that he has filed herewith his affidavit, that from prejudice and local influence he will not be able to obtain justice in the said court of common pleas of Richland county, and he offers herewith his bond, executed by Frederick W. Strong,
of said county of Richland, as surety, in the penal sum of five
21 hundred dollars, conditioned as by the act of Congress required.

Your petitioner therefore prays that the said bond may be accepted as good and sufficient, and that the said suit may be removed into the next circuit court of the United States in and for said northern district of Ohio, pursuant to the statute in such case made and provided, and that no further proceeding may be had therein in this court. And your petitioner will ever pray.

STEPHEN B. STURGES,
By DIRLAM AND LEYMAN,
His Attorneys.

STATE OF NEW JERSEY, } ss:
County of Bergen, }

Personally appeared before me Stephen B. Sturges, the above-named petitioner, who, being first duly sworn, deposes and says: That the allegations in his foregoing petition are true, as he verily believes.

STEPHEN B. STURGES.

Sworn to before me, and subscribed in my presence, this 15th day of November, A. D. 1878.

RUFUS A. GORHAM,
Commissioner of Deeds for the County of Bergen.

STATE OF NEW JERSEY, } ss:
Bergen County, }

I, Thomas W. Demarest, clerk of the county of Bergen, and also clerk of the circuit court of common pleas (courts of record), do hereby certify that Rufus A. Gorham, Esq., whose name is subscribed to the certificate of the proof or acknowledgment of the annexed instrument, and thereon written, was at the time of taking such
22 proof or acknowledgement a commissioner of deeds in and for said county, dwelling in the said county, and duly sworn and authorized to take the same; and, further, that I am well acquainted with the handwriting of the said Rufus A. Gorham, and verily believe that the signature to the said certificate of proof or acknowledgment is genuine.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said court and county, this 15th day of November, A. D. 1878.

[SEAL.] THOMAS W. DEMAREST, *Clerk.*
By WM. S. DOREMUS, *Dep't Cl'k.*

And afterwards, to wit, on the second day of December, A. D. eighteen hundred and seventy-eight, the defendant herein, by his attorneys, filed in the clerk's office aforesaid his affidavit for removal of this cause, which affidavit is in the words and figures following, to wit:

Affidavit.

In the Court of Common Pleas of Richland County, State of Ohio.

JOHN A. LEE, Treasurer of Richland County, Plaintiff, *vs.* STEPHEN B. STURGES, Defendant.

STATE OF NEW JERSEY, } ss:
County of Bergen, }

I, Stephen B. Sturges, being duly sworn, do say That I am the

defendant in the above-entitled cause; that I have reason to believe, and do believe, that from prejudice and local influence I will
23 not be able to obtain justice in said State court.

STEPHEN B. STURGES.

Subscribed by the said Stephen B. Sturges in my presence, and by him sworn to before me at Englewood, N. J., this 14th day of November, A. D. 1878.

RUFUS A. GORHAM,
Commissioner of Deeds in and for the County of Bergen.

STATE OF NEW JERSEY, } ss:
Bergen County, }

I, Thomas W. Demarest, clerk of the county of Bergen, and also clerk of the circuit court and court of common pleas (courts of record), do hereby certify that Rufus A. Gorham, Esquire, whose name is subscribed to the certificate of proof or acknowledgment of the annexed instrument, and thereon written, was at the time of taking such proof or acknowledgment a commissioner of deeds in and for said county, dwelling in the said county, and duly sworn and authorized to take the same; and, further, that I am well acquainted with the handwriting of the said Rufus A. *Cunningham* and verily believe that the signature to the said certificate of proof or acknowledgment is genuine.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said court and county, the 15th day of November, A. D. 1878.

[SEAL.] THOMAS W. DEMAREST, *Clerk,*
By WM. S. DOREMUS, *Dep't Clerk.*

24 And afterwards, to wit, on the 2nd day of December, A. D. 1878, the defendant filed in the clerk's office aforesaid his bond for removal of this cause, which bond is in the words and figures following, to wit:

Bond.

Know all men by these presents, that I, Stephen B. Sturges, as principal, and Frederick W. Strong, as surety, are hereby held and firmly bound unto John A. Lee, treasurer of Richland county, in the penal sum of five hundred dollars, lawful money of the United States; for the payment of which, well and truly to be made, we bind ourselves, jointly and severally, firmly by these presents.

The condition of this obligation is such, that if the said Stephen B. Sturges shall enter and file, or cause to be entered and filed, in the next circuit court of the United States in and for the southern district of Ohio, on the first day of its session, copies of all processes, pleadings, depositions, testimony, and other proceedings in a certain suit or action now pending in the court of common pleas of Richland county, State of Ohio, in which John A. Lee, treasurer of Richland county, is plaintiff and Stephen B. Sturges is defendant, and shall do such other appropriate acts as by the acts of Congress in that behalf are required to be done upon the removal of such suit from said State court unto the said United States court, then this obligation to be void; otherwise of force.

STEPHEN B. STURGES. [SEAL.]
FREDERICK W. STRONG. [SEAL.]

Dated Nov. 12th, 1878.

25 STATE OF OHIO,
Richland County, } *ss:*

I, Frederick W. Strong, of said county, the surety named in the foregoing bond, being duly sworn, do depose and say: That I am a resident of the State of Ohio, and a property holder therein; that I am worth the sum of five thousand dollars over and above all my debts and liabilities and exclusive of property by law exempt from execution; that I have property in the State of Ohio liable to execution of the value of more than five thousand dollars.

FREDERICK W. STRONG.

Subscribed in my presence, and sworn to before me, this 12th day of November, A. D. 1878.

WM. H. RICHIE,
Notary Public, Richland County, Ohio.

Journal Entry.

And afterwards, to wit, at the December term, on the eleventh day of December, A. D. eighteen hundred and seventy-eight, the said defendant, Stephen B. Sturges, above named, having on the 2nd day of December, 1878, filed in this court his petition, bond, and affidavit for the removal of this cause into the circuit court of the United States for the northern district of Ohio in the sixth circuit, in pursuance of the laws of the United States relating to the removal of suits from the State courts, and the court upon examination thereof, and finding that said bond and sureties offered are sufficient and in accordance with said laws, and on motion of 26 Dirlam and Leyman, attorneys for said defendant, it is hereby ordered that said petition and security be accepted, and the said suit be removed into the next circuit court of the United States, to be held in said western district of Ohio, and that no further proceedings be had in said suit in this court.

THE STATE OF OHIO,
Richland County. } *ss:*

I, Thomas T. Dill, clerk of the court of common pleas within and for the county of Richland and State of Ohio, do hereby certify the above and foregoing to be a true and complete copy of all the record, processes, pleadings, testimony, and proceedings in said court of common pleas had or filed in the above-entitled cause.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of said court, at the city of Mansfield, Ohio, this 18th day of December, A. D. 1878.

[SEAL.] THOS. T. DILL, *Clerk.*

Endorsed: U. S. circuit court N. D. O. No. 3809. Transcript from common pleas court. Filed December 21st, 1878. A. J. Ricks, clerk.

And afterwards, to wit, on the 3rd day of January, A. D. 1879, being a day of the October term, A. D. 1878, of said court, this cause was continued to the next term of said court.

27 And afterwards, to wit, on the 31st day of March, being a day of the January term, A. D. 1879, of said court, this cause was continued to the next term of said court.

And afterwards, to wit, on the 10th day of May, A. D. 1879, the following motion was filed in this cause in this court, being in the words and figures following, to wit:

Motion to Jurisdiction.

Circuit Court.

JOHN A. LEE, Treasurer,
vs. } No. 3809.
STEPHEN B. STURGES.

And now comes the plaintiff, by his counsel, and moves the court to dismiss this action and remand the same for trial to the court of common pleas of Richland county, from which court the same was certified to this court, and for cause says:

That when said action was commenced in said court of common pleas the defendant was a citizen of the State of Ohio, residing in said Richland county; was there served with process, and filed his answer therein while such citizen and resident. That afterwards he removed to the State of New Jersey, and now claiming to be a citizen thereof. That during all the time aforesaid, to wit, from August the 16th, 1878, to Nov. —, 1878, this court did not have jurisdiction of the parties because of their citizenship, and he sub- 28
mits that this court has not now jurisdiction, on the ground that defendant could not afterwards, by removing to another State, confer jurisdiction where it did not before exist.

By JENNER AND TRACY AND
ESTEP AND SQUIRE,
Attorneys.

Motion Overruled.

And afterwards, to wit, on Saturday, the 10th day of May, A. D. 1879, being a day of the April term of said court, the Honorable Martin Welker, district judge, presiding, this cause came on for hearing upon the plaintiff's motion to remand this cause to the common pleas court of Richland county, which motion was, upon consideration by the court, overruled.

To which ruling of the court the plaintiff, by his attorney, excepts.

Continuance.

And afterwards, to wit, on the 6th day of October, A. D. 1879, being a day of the April term of said court, this cause was continued to the next term of said court.

And afterwards, to wit, on the 5th day of January, A. D. 1880, being a day of the October term, A. D. 1879, of said court, this cause was continued to the next term of said court.

29 And afterwards, to wit, on the 5th day of January, A. D. 1880, the following reply was filed in this cause, being in the words and figures, to wit:

Reply.

Circuit Court of the United States.

TREASURER OF RICHLAND COUNTY, OHIO, Plaintiff,
against
STEPHEN B. STURGES, Defendant.

Merchant Carter says: That he is the duly elected, qualified, and acting treasurer of the county of Richland, State of Ohio; that he succeeded one John A. Lee as treasurer of said county, and he asks that he may be substituted as plaintiff instead of said John A. Lee in the cause now pending in said circuit court in which said Lee, as such treasurer, is plaintiff and Stephen B. Sturges is defendant.

The plaintiff, for reply to the answer of defendant, says: It is true that the taxes sued for cover the years 1874, 1875, 1876, 1877.

It is true that for each of said years the defendant made returns of personal property to the assessor in the respective amounts set forth in his said answer, and paid to the treasurer of the county the taxes assessed thereon; and it is true that no other taxes were charged on the duplicate of said county of Richland during said years 30 on personal property against the defendant.

It is true that a part of plaintiff's claim consists of a tax assessed upon $100,000 in value of the stock of the Western Union Telegraph Company and other credits amounting to $35,090 for year 1875, which the defendant failed and neglected to return to the assessor for taxation in said year, or at any other time.

It is true that a part of plaintiff's claim consists of a tax assessed upon $100,000 in value in stock of the Western Union Telegraph Company and other credits amounting to $41,090 for the year 1876, which the plaintiff failed and neglected to return to the assessor for taxation in said year or at any other time; and it is true that a part of plaintiff's claim is upon the like amount of stocks and credits for the year 1877, which the plaintiff failed and neglected to return to the assessor for taxation in said year or at any other time. And plaintiff admits that his whole claim consists of the taxes on the property aforesaid for each year, with the penalty allowed by law thereon. Plaintiff admits that at the commencement of this suit said taxes and penalties did not stand charged upon the respective tax duplicate of

said Richland county for the years 1874, 1875, 1876, 1877. The plaintiff admits that the original sheets or returns made by the defendant to the assessor have not been changed, but avers that the amount of property so wrongfully omitted by the defendant
31 has been corrected pursuant to law. The plaintiff admits that said Western Union Telegraph Company is an incorporation organized under the laws of New York, and that it transacts business and owns property in the State of Ohio.

Plaintiff denies that said Western Union Telegraph Company during said year, or any one of them, paid taxes in the State of Ohio or elsewhere upon the capital stock, or that it ever listed or returned for taxation its capital stock in the State of Ohio or elsewhere, and the plaintiff denies each and every allegation of said petition not heretofore specifically admitted or denied and for further reply says that on or about July 23rd, 1878, the auditor for said county of Richland was informed that for the years aforesaid the defendant had given to the assessor false statements of his credits, investments, bonds, and stocks, and property, and had not returned the full amount required by law to be listed, and which were by law subject to taxation, to ascertain the truth of which information said auditor took testimony and gave notice to defendant of the same. That defendant appeared and was himself examined and failed to show his returns for said years correct. That as the result of said examination said auditor found that said defendant owned and should have returned for taxation in each of said years the stocks, credits, and property aforesaid, and that the same were omitted from said
32 returns falsely by defendant, and that the same was duly entered upon the books of additions and deductions kept by said auditor and certified to the treasurer charged with the collection of the same. Of all which the defendant had notice. That said taxes remain unpaid and are still due to the plaintiff as such treasurer.

JENNER AND TRACY,
ESTEP AND SQUIRE,
Att'ys for Pl'ff.

STATE OF OHIO, }
County of Richland, } *ss:*

Merchant Carter, being duly sworn says: That he is the duly elected, qualified, and acting treasurer of said county, and plaintiff herein; that the facts stated in the foregoing pleading are true as he verily believes.

MERCHANT CARTER, *Treasurer.*

Sworn to before me and subscribed in my presence, Nov. 25th, 1879.

[SEAL.]

JAMES S. CRALL,
Deputy Clerk.

Continuance.

And afterwards, to wit, on the 4th day of March, A. D. 1880, being a day of the January term, A. D. 1880, of said court, this cause was continued to the next term of said court.

33 *Stipulations.*

And afterwards, to wit, on the 8th day of April, A. D. 1880, the following stipulations in this case were filed in this court, being in the words and figures following, to wit:

Stipulation Between Parties.

In the United States Circuit Court of the Northern District of Ohio.

John A. Lee, Treasurer of Richland County, Ohio, Plaintiff,
against
Stephen B. Sturges, Defendant.

The following facts are mutually agreed to so far as competent for either party in this cause:

The Western Union Telegraph Company is a corporation organized under the laws of the State of New York, and carries on the business of transmitting telegraphic dispatches into and through the State of Ohio and the other States of the United States for the public, for hire, and has for the last ten years. That its capital stock is $41,073,410, all paid up and of value.

That said company owns real estate not in the State of Ohio, exclusive of its line, of the value of $2,635,556.86.

That the length of its entire line (poles) is 76,955 miles.

The length of its line in the State of Ohio is 4,950 miles.

34 Its entire length of wire, 194,323 miles.

Its length of wire in the State of Ohio is 13,500 miles. That its property within the State of Ohio consists of the said 13,500 miles of wire, the said 4,950 miles of posts, there being from twenty to thirty posts to the mile, the telegraphic apparatus and chemicals and office furniture of 425 offices in said State.

That it has returned said property in the State of Ohio for taxation in the State of Ohio each year since 1872.

That all its other property is located in other States.

That each and every year from 1872 to present time said telegraphic company has paid in the State of Ohio, on said property situated therein, from $10,000 to $15,000 taxes, distributed through the counties through which its line of wires and poles extended.

The Lake Shore and Michigan Southern Railway Company is the result of the consolidation of a number of original corporations of the several States of Michigan, Indiana, Ohio, Illinois, Pennsylvania, and New York, and is the owner of a line of railroad from the city of Buffalo, State of New York, west along the shore of Lake Erie, through the State of Pennsylvania, Ohio, Michigan, Indiana, and into the State of Illinois, terminating at Chicago in said State.

It is also the owner of feeders and branch lines connecting with said main line.

35 Its capital stock is $50,000,000.00, made up from the aggregate capital stock of the several corporations that were consolidated to create it.

377 miles of its track is located in the State of Ohio.

That for the last six years the said corporation has returned and listed its property in the State of Ohio for taxation, consisting of its line of railroad, road-bed, depots, station-houses, and the necessary real estate for the same, and rolling-stock and other property, at a valuation of over $13,000,000, and has paid taxes in said State upon that amount for each and all of said years, in the counties through which said railroad extends, as provided by statute of said State.

That in the year 1877 it paid taxes in the several counties in the State of Ohio through which it runs, as provided by law, in the aggregate amount of $286,017.38.

It is further agreed that if the detailed statement of the manner of the organization of said corporation, and those of which it is composed, becomes material, that either party may introduce in evidence the corporation history of said railroad company as found in the Ohio Railway Report for the year 1874, commencing on page 132 and ending on page 139. It is agreed that the same is true.

That the stock of the Lake Shore Company, which consisted of
a consolidation of all the Ohio companies, amounted to
36 $15,000,000, and that by the terms of the consolidations of
the various railroad corporations composing the Lake Shore
and Michigan Southern Railway Company it was agreed that the
owners of the stock of the said Lake Shore Company should be entitled
to an equal amount, or $15,000,000, of the said Lake Shore and Michigan
Southern Railway Company's stock.

This agreement is not to preclude either party from introducing such other competent testimony as may be offered on the trial of said cause.

DERHAM AND LEYMAN,
For S. B. Sturges.
JANNER AND TRACY,
Att'ys for Plaintiff.

It is further stipulated that the notice hereto attached, marked Exhibit (K), is all the written notice served upon S. B. Sturges before said taxes were assessed against him.

That Exhibit (L), hereto attached, is a true copy of all the testimony given by S. B. Sturges before the auditor.

That Exhibits M, N, O, P, hereto attached, are true copies of the respective tax returns made by S. B. Sturges to the assessor in the respective years.

DERLAM AND LEYMAN,
Att'ys for S. B. Sturges.
JENNER AND TRACY,
Att'ys for Plaintiff.

37 EXHIBIT K.

MANSFIELD, OHIO, *July* 23, 1878.

To STEPHEN B. STURGES:

You are hereby notified to appear at the auditor's office in Mansfield, Richland county, Ohio, on this the 23rd day of July, 1878, at 10 o'clock a. m., to give information as to any property, goods, or chattels in said county which has not been listed for taxation as provided by law.

M. D. WARD.

I certify the above to be a correct copy of a notice sent to M. D. Ward, auditor.

(Mem.:) The following, copied on this notice, is in pencil: "The above is all the written notice ever served on S. B. Sturges in reference to said taxes before they were entered."

A. J. R., *Clerk.*

EXHIBIT (L.)

S. B. STURGES, after being duly sworn, deposes and says: That he is a resident of Mansfield, Richland county, Ohio; aged 51; occupation, real estate, &c.

Q. Please state what stocks or bonds or investments in stocks or bonds of any foreign incorporated company has been held or owned by you during the past four years, or by any other citizen of Richland county, to your knowledge.

38 A. I don't know that I have the means of answering the question as to the preceeding four years at all accurately as to myself; as to others, I cannot answer.

Q. Please state as to the present time and the currant year.

A. As to others, I have no accurate information; as to myself, I have dealt in L. S. and M. S. R. R. stocks and Western Union Tel. stock. The average value of stocks so dealt in I cannot now state. At close of the current tax year I owned something less than one hundred thousand (par value) of L. S. and M. S. R. R. stock. The cash value of what I owned of L. S. and M. S. was somewhere from thirty-five to forty thousand dollars. Before I may have owned of the Western Union Tel. stock, at sometimes during the four years, worth something over one hundred thousand dollars in cash.

Q. Will you please examine the memorandum of judgments and mortgages in your favor, handed to the auditor by the clerk and recorder, and state whether or not they are unpaid or not?

A. They may appear on the record as made out; some are omitted, some are settled, some are held as collateral for others; some are security, and represent no cash value, and payments are made on some. The net amount due me from the memorandums and all others in my possession or ownership I judge to be something less than forty-five thousand dollars. My debts I estimate at from sixty to seventy thousand dollars. This refers to the close of the current tax year. A portion of the indebtedness would be created by investments in L. S. and M. S. stock; about one-half of the amount.

39 Q. State whether you had any money on deposit with banks or others, here or elsewhere, subject to draft or demand on the day preceeding the second Monday of April, 1878.

A. I don't know of any such credit.

S. B. STURGES.

EXHIBIT M.

Tax Notice for 1877.

To —— ——:

You are notified to make out and hold in readiness for me a statement in the following form of all personal property, moneys, credits, over and above your indebtedness, investments in bonds, stocks, joint stock companies, or otherwise, in your possession or under your control as owner or holder, or as husband, parent, guardian, trustee, executor, administrator, receiver, accounting officer, agent, attorney, or factor, on the day preceeding the second Monday of April, 1878. You will also be prepared to furnish the statistics of crops, &c., indicated by the schedule on the last two pages of this notice. —— ——, *Assessor.*

Dated Mansfield, O., 1877.

Statement of Personal Property, Moneys, Credits, &c., subject to Taxation in Richland County, for the year 1878, *belonging to S. B. Sturges, and listed by* —— ——.

	Number.	Value.
1. Horses	2	$180
2. Cattle	1	25
3. Mules and asses		
4. Sheep		
5. Hogs	2	10
6. Pleasure carriages, wagons, &c.	5	300
40 7. Value of household goods and furniture of every kind, gold and silver plate, china ware, jewelry, books, farming utensils, grain, wool, agricultural products of every kind, lumber, coal, wood, stone, steamboats, canal boats (or shares in such boats) & all other articles of personal property not included in any of the foregoing or subsequent items of this statement		1,000
8. Gold and silver watches	2	100
9. Piano fortes	1	300
10. Monthly average value of all goods & merchandise owned or held by me, during the year or part thereof, ending the day preceeding 2nd Monday of April, 1878		
11. Monthly average value "of all articles purchased, received, or otherwise held by me for the purpose of being used, in whole or in part, in any process or operation of manufacturing, combining, rectifying, refining "during the year, or part thereof, ending the day preceeding the 2nd Monday of April, 1878		
12. Value of all articles on hand the day preceding the 2d Monday of April, 1878, which have been		

Number. Value.

by me manufactured or changed in any way, either by combination, rectifying, refining, or adding thereto, one year or more previous to that day, & of all tools, implements, engines, and machinery used or designed to be used in manufacturing, except such as are appraised as part of the real estate ------------------

13. Monthly average value of moneys, credits, or other personal property that has been converted into non-taxable bonds, or other securities of the U. S. or of this State during the year or part thereof ending the day preceding the 2nd Monday of April, 1878----------

41 14. Value of all moneys in possession or on deposit, subject to draft on demand, with banks or others-----------------------------

15. Value of all credits, after deducting *bona-fide* debts (but debts cannot be deducted from moneys or the value of anything but credits, nor can debts created by investments, as in No. 13 above, be deducted from the value of said credits ------------------------------

16. Value of investments in the capital stock of any bank (other than National banks), corporation, or company outside of this State, and in the bonds, securities, or other evidence of the indebtedness of any State, or foreign government, or bank, railroad, or other company, corporation, or association, or city, town, township, county, or village in this or any other country ------------------------------

Dogs.

(Under act of May 5, 1877. Laws, p. 177.)

17. Dogs over 3 mo. old, where owner or keeper does not value, but the number of which is sworn to------------------------------------

18. Dogs listed at $50 and under (value not required to be sworn to) --------------------------

19. Dogs at valuation exceeding $50-------------

Total value of all the items ------------------ -- $1,915

If the person required by law to list refuses or neglects to swear to the number and value of the property embraced in the first seven items, or the correctness of the number, if exhibited, or refuses or neglects to list and swear to the number and value of the whole, or of any of the other items in the list, when requested to do so by the assessor, the assessor will then make the return from his own knowledge, or from information of others, and will enter on the margin of the list, "Refused to list" or "Refused to swear," as the case may be, to which return the auditor will add fifty per cent. as penalty.

THE STATE OF OHIO, } *ss:*
Richland County, }

I, (*a*) S. B. Sturges, do solemnly (*b*) swear that, to the best of 42 my knowledge and belief, I have listed or exhibited to the assessor all the personal property, moneys, credits over and above my indebtedness, investments in bonds, stocks, joint stock companies, or otherwise, in my possession, or under my control as owner or holder, or as husband, parent, guardian, trustee, executor, administrator, receiver, accounting officer, agent, attorney, or factor, on the day preceding the second Monday of April, 1877, which are subject to taxation under the laws of this State.

S. B. STURGES.

Sworn to and subscribed before me, this — day of ——, 1878.

P. P. FORD, *Assessor.*

EXHIBIT N.

Tax Notice for 1876.

To —— ——:

You are notified to make out and hold in readiness for me a statement in the following form of all personal property, moneys, credits over and above your indebtedness, investments in bonds, stocks, joint stock companies, or otherwise, in your possession or under your control as owner or holder, or as husband, parent, guardian, trustee, executor, administrator, receiver, accounting officer, agent, attorney, or factor, on the day preceding the second Monday of April, 1878. You will also be prepared to furnish the statistics of crops, &c., indicated by the schedule on the last two pages of this notice.

—— ——, *Assessor.*

Dated Mansfield, O., 1876.

Statement of Personal Property, Moneys, Credits, &c., subject to Taxation in Richland County for the Year 1876, *belonging to S. B. Sturges, and listed by* —— ——.

43

	No.	
1. Horses	2	$200
2. Cattle	2	40
3. Mules and asses		
4. Sheep		
5. Hogs	2	5
6. Pleasure carriages, wagons, &c.	3	250
7. Value of household goods & furniture of every kind, gold & silver plate, chinaware, jewelry, books, farming utensils, grain, wool, agricultural products of every kind, lumber, coal, wood, stone, steamboats, canal-boats (or shares		

		No.	
	in such boats), and all other articles of personal property not included in any of the foregoing or subsequent items of this statement		1,000
	Total value of the 1st seven items		
8.	Gold and silver watches	2	150
9.	Piano fortes	1	300
10.	Monthly average value of all goods & merchandise owned or held by me during the year or part thereof ending the day preceding the second Monday of April, 1878		
11.	Monthly average value "of all articles purchased, received, or otherwise held by me for the purpose of being used in whole or in part in any process or operation of manufacturing, combining, rectifying, or refining" during the year, or part thereof, ending the day preceding the second Monday of April, 1878		
12. 44	Value of all articles on hand the day preceding the 2nd Monday of April, 1878, which have been by me manufactured, or changed in any way, either by combination, rectifying, refining or adding thereto, one year or more previous to that day, & of all tools, implements, engines, & machinery used or designed to be used in manufacturing, except such as are appraised as part of the real estate		
13.	Monthly average value of moneys, credits, or other personal property that has been convertable into non-taxable bonds, or other securities of the United States or of this State, during the year or part thereof ending the day preceding the 2nd Monday of April, 1878		
14.	Value of all moneys in possession or on deposit, subject to draft on demand, with banks or others		
15.	Value of all credits, after deducting *bona-fide* debt, (but debts cannot be deducted from moneys, or the value of anything but credits, nor can debts created by investments, as in No. 13 above, be deducted from the value of said credits.)		
16.	Value of investments in the capital stock of any bank (other than national banks), corporation, or company outside of this State, and in the bonds, securities, or other evidence of the indebtedness of any State or foreign government, or bank, railroad, or other company, corporation, or association, or city, town, township, county, or village in this or any other country		150

Dogs.

Under Act of May 5, 1877, Laws, p. 177.

	No.	
17. Dogs over three months old, where owner or keeper does not value, but the number of which is sworn to		
18. Dogs listed at $50.00 & under (value not required to be sworn to.)		
19. Dogs at a valuation exceeding $50.00		
Total value of all the items		$2,095 00

45 THE STATE OF OHIO,
Richland County, } *ss:*

I, (*a*) S. B. Sturges, do solemnly (*b*) swear that, to the best of my knowledge and belief, I have listed or exhibited to the assessor all the personal property, moneys, credits, over and above my indebtedness, investments in bonds, stocks, joint stock companies, or otherwise, in my possession or under my control, as owner or holder, or as husband, parent, guardian, trustee, executor, administrator, receiver, accounting officer, agent, attorney, or factor, on the day preceding the second Monday of April, 1876, which are subject to taxation under the laws of this State.

S. B. STURGES.

Sworn to and subscribed before me, this —— day of ——, 1878.

P. P. FORD, *Assessor.*

EXHIBIT O.

Tax Notice for 1875.

To —— ——:

You are notified to make out and hold in readiness for me a statement, in the following form, of all personal property, moneys, credits over and above your indebtedness, investments in bonds, stocks, joint stock companies, or otherwise, in your possession or under your control as owner or holder, or as husband, parent, guardian, trustee, executor, administrator, receiver, accounting officer, agent, attorney, or factor, on the day preceding the second Monday of April, 1878. You will also be prepared to furnish the statistics of crops, &c., indicated by the schedule on the last two pages of this notice.

—— ——, *Assessor.*

Dated Mansfield, O., 1875.

46 *Statement of Personal Property, Moneys, Credits, &c., subject to taxation in Richland County for the year* 1875, *belonging to S. B. Sturges and listed by* ———.

	No.	
1. Horses	2	$200
2. Cattle	2	40
3. Mules and asses		
4. Sheep		
5. Hogs	2	10
6. Pleasure carriages, wagons, &c.	3	300
7. Value of household goods & furniture of every kind, gold & silver plate, china ware, jewelry, books, farming utensils, grain, wool, agricultural products of every kind, lumber, coal, wood, stone, steamboats, canal boats (or shares in such boats), & all other articles of personal property not included in any of the foregoing or subsequent items of this statement	--	1,200
8. Gold and silver watches	2	200
9. Piano fortes	1	300
10. Monthly average value of all goods and merchandise owned or held by me during the year, or part thereof, ending the day preceding the 2nd Monday of April, 1878		
11. Monthly average value "of all articles purchased, received, or otherwise held by me for the purpose of being used, in whole or in part, in any process or operation of manufacturing, combining, rectifying, or refining" during the year, or part thereof, ending the day preceding the second Monday of April, 1878		
12. Value of all articles on hand the day preceding the 2nd Monday of April, 1878, which have been by me manufactured or changed in any way, either by combination, rectifying, refining or adding thereto, one year or more previous to that day, & of all tools, implements, engines, and machinery used or designed to be used 47 in manufacturing, except such as are aapraised as part of the real estate		
13. Monthly average value of moneys, credits, or other personal property that has been convertable into non-taxable bonds, or other securities of the United States, or of this State, during the year, or part thereof, ending the day preceding the second Monday of April, 1878		
14. Value of all moneys in possession or on deposit subject to draft on demand with bank or others		
15. Value of all credits after reducing *bona fide* debts (but debts cannot be deducted from		

No.

moneys, or the value of anything but credits; nor can debts created by investments, as in No. 3, above, be deducted from the value of said credits) ------------------------------

16. Value of investments in the capital stock of any bank (other than national banks) corporation or company outside of this State; and in the bonds, securities, or other evidence of the indebtedness of any State or foreign government, or bank, railroad or other company, corporation or association, or city, town, township, county or village, in this or any other country ------------------------------ 300

Dogs.

Under Act of May 5, 1877, Laws, p. 177.

17. Dogs over 3 mo. old, where owner or keeper does not value, but the number of which is sworn to ------------------------------
18. Dogs listed at $50.00 and under (value not required to be sworn to) --------------------
19. Dogs at a valuation exceeding $50.00 ---------

$2,550 00

48 The State of Ohio, }
Richland County, } *ss:*

I, S. B. Sturges, do solemnly swear that, to the best of my knowledge and belief, I have listed or exhibited to the assessor all the personal property, moneys, credits, over and above my indebtedness, investments in bonds, stocks, joint stock companies or otherwise, in my possession, or under my control, as owner or holder, or as husband, parent, guardian, trustee, executor, administrator, receiver, accounting officer, agent, attorney, or factor, on the day preceding the second Monday of April, 1875, which are subject to taxation under the laws of this State.

S. B. STURGES.

Sworn to and subscribed before me, this — day of ——, 1878.
P. P. FORD, *Assessor.*

Exhibit P.

Tax Notice for 1874.

To—— ——:

You are notified to make out and hold in readiness for me a statement in the following form of all personal property, moneys, credits, over and above your indebtedness, investments in bonds, stocks, joint stock companies, or otherwise, in your possession or under your control, as owner or holder, or as husband, parent, guardian, trustee, executor, administrator, receiver, accounting officer, agent, attorney, or factor, on the day preceeding the second Monday of April, 1878. You will also be prepared to furnish the statistics of crops, &c., indicated by the schedule on the last two pages of this notice.

—— ——, *Assessor.*

Dated Mansfield, Ohio, 1874.

49 *Statement of Personal Property, Moneys, Credits, &c., subject to Taxation in Richland County for the year* 1874, *belonging to S. B. Sturges, and listed by* —— ——.

	No.	
1. Horses	2	$200
2. Cattle	1	15
3. Mules and asses		
4. Sheep		
5. Hogs		
6. Pleasure carriages, wagons, &c.	3	300
7. Value of household goods and furniture of every kind, gold & silver plate, chinaware, jewelry, books, farming utensils, grain, wool, agricultural products of every kind, lumber, coal, wood, stone, steamboats, canal boats (or shares in such boats), and all other articles of personal property not included in any of the foregoing or subsequent items of this statement		1,200
8. Gold and silver watches	2	200
9. Piano fortes	1	300
10. Monthly average value of all goods, &c.		
11. Monthly average value of all articles purchased, &c.		
12. Value of all articles on hand, &c.		
13. Monthly average value of moneys, &c.		
14. Value of all moneys, &c.		
15. Value of all credits, &c.		
16. Value of investments in the capital stock of any bank (other than national banks), corporation, or company outside of this State, & in the bonds, securities, or other evidence of indebtedness of any State or foreign government, or bank, railroad, or other company, corporation, or association, or city, town, township, county, or village in this or any other country		300
Dogs, &c.		
Total value of all the items		$2,515 00

50 THE STATE OF OHIO, }
Richland County, } *ss:*

I, Stephen B. Sturges, do solemnly swear that, to the best of my knowledge and belief, I have listed or exhibited to the assessor all the personal property, moneys, credits, over and above my indebtedness, investments in bonds, stocks, joint stock companies, or otherwise in my possession or under my control as owner or holder, or as husband, parent, guardian, trustee, executor, administrator, receiver, accounting officer, agent, attorney, or factor, on the day preceeding the second Monday of April, 1874, which are subject to taxation under the laws of this State.

S. B. STURGES.

Sworn to and subscribed before me, this — day of ———, 1878.

P. P. FORD, *Assessor.*

Mem. of Testimony.

M. D. Ward; auditor of Richland county, and have been since 1877.

Mr. Sturges came in within a day or two after served with the notice here read was served upon him; I exhibited the testimony I had from recorder and clerk, and testimony of Jones and others, and told him I proposed to tax him; that I had such instructions from auditor of State; he did not think it taxable; statute read to him; I showed statements to him and told him I wanted to correct them if there was anything wrong in them; he said nothing but the testimony I wrote down; final settlement made Aug. 10, and
this carried into duplicate about July 25 or 26; law provided
51 it might go on duplicate any time before final settlement.

Served subpœna, and Mr. Sturges obeyed subpœna. Jenner there. Served same subpœna on Emmiger and others whose taxes were not increased. I wanted to know if Sturges had the $100,000 of stock. Mr. Jenner was there. I think I can point out statutes that were there read. After I made up duplicate Sturges did not have knowledge of credits, but did have of Western Union stock. I told him there that I should put the W. U. stock on, and he said he had $100,000 of stock each year, W. U. stocks. As to credits, he told me what is in the paper. He made pencil corrections on margin of credits.

In 1874, W. U. stock.
" 1875, " " " & $35,000, about, of credits.
" 1876, " " " & about $40,000 " "
" 1877, " " " & about $40,000 " "

STEPHEN STURGES:

In 1874 the gross indebtedness exceeded my estimate made at time of this examination. To my father's estate my indebtedness fixed was about $21,000. Contingent indebtedness $6 to $7,000. This standing against me from 1868. Indebtedness to Richland National Bank accrued in winter of 1873 amounted to about

$20,000. It was an indebtedness assumed and paid along in next 3 or 4 years. Made last payment in spring or summer of 1876, to the best estimate I can make. On Henry Sturgis' account I assumed,
in 1873, an indebtedness of about $25,000—a little less. I
52 gave my notes for this to Nichols, of Boston, about $8,000,
Exchange Bank of Belleville about $12,000, and B'k Tiffin
$5,000.00, about. In $39,000, $24,000, and 2 $5,000 judgments had no interest, except as collateral to me to secure above indebtedness and expenses. Henry paid about $5,000 on $24,000 judgment in spring of 1874. Judgment against Parker was very doubtful. I called it worth $2,000. Mortgage from Parker represents same indebtedness. Credit against Martain Bushnell of about $1,800 reduced about $400 a year after 1875. Another against Wade of about $1,200. Mortgage of $100 against Smith, no value; mortgage of $600 against Horace Smith, worthless; mortgage of $2,500 against Bigelow, paid long ago; mortgage of $150 against John Thompson, no value; mortgage of $10,000 against Mansfield Machine Works, an indemnity mortgage, I being assignee, never represented any value. I was liable as surety for my brother Daniel, and expected to have to pay it—$8,800 in 1871. I have not had to pay it. I can't give indebtedness in New York, except to estimate. It ran from $18,000 to $50,000 a year. I don't know of any credits that should go on. My business in New York city was buying and selling stocks in New York, & my money was sent there with the intention of following it there myself. My money has not been in Ohio for ten years. I had money in New York when I began. I employed
$90,000 in business, and that was kept there. Indebtedness
53 I assumed of Richland Bank in 1873. Bank paid taxes.

Cross-examination:

At Park National Bank I sometimes had $50,000 to $100,000. After 1868 I had more than $100,000 employed. I did not pay taxes on my money in New York. I did not have $200,000 during any of these years. In 1874 my direct liabilities to estate held by trustees of estate, of about $15,000. I have not a dollar coming to me from that estate. I did not pay for Richland Bank stock. I bought from my brothers. I was his surety to bank for about $18,000. Paid that and took stock. Paid part of it—$15,000—by note, which they carried along for me. H. H. Sturges was indebted about $12,000 to Bank of Bellville; was arranged by my giving my notes, which matured and were paid in 1874. I don't know whether my judgment is ample security. The $39,000 of judgments assigned to me, and are a lien upon the property.

Redirect:

I haven't any recollection of seeing any testimony being shown me by auditor.

In addition to the foregoing statement, the defendant, S. B. Sturges, agreed that he held Western Union Telegraph stock during the years 1874, 1875, 1876, and 1877 of the value following, to wit:

1874, on the day preceeding the 2nd Monday in April ----	$100,000
1875, “ “ “ “ “ “ ----	$100,000
1876, “ “ “ “ “ “ ----	$100,000
1877, “ “ “ “ “ “ ----	$100,000

54 He also admits that the judgment appearing on the annexed schedule, marked A, is the same as used in the examination before the auditor, and is correctly taken from the records of the court of common pleas of Richland county, but reserves the right to show the amount remaining unpaid thereon and the value thereof each year for which the taxes are charged, and also to reduce the same by *bona-fide* debts, as permitted by law; and further proof of said judgments is hereby waived. It is also agreed that Exhibit G, hereto attached, is a correct copy of the statement made and filed by auditor of Richland county under statute, vol. 75, pages 456 and 457, with caption and certificate. That Exhibit H is a correct copy of the entry made by the auditor in his book of additions and deductions.

That Exhibit I is a correct copy of the entries in relation to the tax in suit made by the auditor and certified to the treasurer, and that either party may use the same on trial to the same extent that the original entries might legally be used without production of originals.

JENNER AND TRACY,
Attorneys for Plaintiff.
DIRLAM AND LEYMAN,
Attorneys for S. B. Sturges.

55 EXHIBIT “B.”

Mortgages standing in favor of S. B. Sturges on the records of Richland county in my office, and not released.

JERRY S. BOLLMAN, *Recorder.*

January 23rd, 1850, Ephraim Smith to S. B. Sturges ------	$100 00
“ 24th, 1850, Horace Baker to S. B. Sturges ------	600 00
June 6th, 1856, Perkins Biglow “ “ “ “ ------	2,500 00
October 1st, 1872, John Thompson “ “ “ “ ------	150 00
Feb. 6th, 1874, Mansfield Machine Works to S. B. Sturges -	10,000 00
“ 12th, 1877, Henry M. Parker “ “ “ “ -	2,600 00

EXHIBIT “A.”

Stephen B. Sturges

vs.

Edward Sturges, Sen., A. L. Grimes, J. H. Cook, John Wood, R. Brinkerhoff, E. W. Smith, Dimon Sturges.

Am't judgment, $5,739.05. Int. from Dec. 3rd, 1877.

Stephen B. Sturges
vs.
Mansfield, Coldwater and Lake Michigan R. R. Co.

Am't judgment, $39,183.51. Int. from Dec. 7th, 1874, at 8 per cent.

Stephen B. Sturges
vs.
H. M. Parker.

Am't judgment, $3,536.77. Int. from Nov. 13th, 1876, at 8 per cent.

56 Stephen B. Sturges
vs.
The Mansfield, Coldwater and Lake Michigan R. R. Co.

Am't judgment, $3,305.33. Int. from Dec. 7th, 1874, at 8 per cent.

Stephen B. Sturges
vs.
J. H. Cook, H. H. Sturges, H. Colby, and W. S. Hickox.

Am't judgment, $5,285.84. Int. from Sep't 14, 1874, at 8 per cent.

Stephen B. Sturges
vs.
H. H. Sturges, J. H. Cook, H. Colby. B. Burns, and Willard S. Hickox.

Am't judgment, $5,250.00. Int. from Sept. 14th, 1874.

Stephen B. Sturges
vs.
H. H. Sturges, J. H. Cook, First National Bank of Mansfield, Ohio, and Southern Michigan Nat'l Bank of Coldwater, Mich.

Am't judgment, $24,555.61. Int. from Sept. 14th, 1874.

57 EXHIBIT "I.'.

Duplicate of Taxes Assessed upon the Personal Property of—

Owners' name.	Description.	Value.	Road tax.	Total taxes
Sturges, S. B.	For 1874	100,000		$2,070 00
Same.	" 1875	135,090		2,823 38
Same.	" 1876	141,090		2,977 00
Same.	" 1877	141,090		2,906 45

I certify the foregoing to be a correct statement of the additional taxes charged by me against the hereinbefore named, as provided by law.

M. D. WARD,
County Auditor, Richland County, O.

EXHIBIT H.

Additionals and Deductions in Mansfield Town, Richland County, Ohio' for the year 1877.

Names of owners.	Description.	Value of personal.	Amount of additions.	Remarks.
Sturges, S. B.	Stocks & credits	100,000	2,070 00	For 1874
Same.	"	135,090	2,823 38	" 1875
Same.	"	141,090	2,977 00	" 1876
Same.	"	141,090	2,906 45	" 1877

58

EXHIBIT G.

I find that the amount of personal property of the following named, S. B. Sturges, in addition to the amount of personal property listed by him, and returned by the assessor of Mansfield, Richland county, Ohio, to be as follows:

For 1874.	Western Union Tel. stock, worth		$100,000 00
" 1875.	Western Union Tel. stock, worth	100,000	
" "	Credits	35,090	
	Total for 1875		135,090 00
For 1876.	Western Union Tel. stock, worth	100,000	
" "	Credits	41,090	
	Total for 1876		141,090 00
For 1877.	Western Union Tel. stock, worth	100,000	
" "	Credits	41,090	
	Total for 1877		141,090 00

The above is a correct statement taken from original on file in this office.

M. D. WARD, *Auditor.*

Continuance.

And afterwards, to wit, on the 28th day of June, being a day of the April term, A. D. 1880, of said court, this cause was continued to the next term of said court.

59 And afterwards, to wit, on the 16th day of November, A. D. 1880, being a day of the October term of said court, the following proceedings were filed in this cause in this court, to wit:

Waiver of Trial by Jury.

In the United States Circuit Court for the Northern District of Ohio.

JOHN A. LEE, Treasurer of Richland County, Ohio, Pl'ff,
against
STEPHEN R. STURGES, Defendant.

Now comes the plaintiff, by his attorneys, and the defendant, by his attorneys, and waive a trial by jury in the above-entitled cause, and consent that the court may try the same.

Dated May 11th, 1879.

STEPHEN B. STURGES,
Per DIRLAM AND LEYMAN,
His Attorneys.
JOHN A. LEE, *Treasurer,*
By JENNER AND TRACY,
His Attorneys.

Continuance.

And afterwards, to wit, on the 3rd day of January, A. D. 1881, being a day of the October term, A. D. 1880, of this court, this cause was continued to the next term of said court.

60 And afterwards, to wit, on the 4th day of April, being a day of the January term, A. D. 1881, of this court, this cause was continued to the next term of said court.

And afterwards, to wit, on the 29th day of November, A. D. 1881, being a day of the October term, A. D. 1881, of said court, the Honorable John Baxter and the Honorable Martin Welker, presiding, the following proceedings were had in this cause, to wit:

Judgment.

JOHN A. LEE, Treasurer,
vs.
STEPHEN B. STURGES.
No. 3809. Law.

This day come the parties, by their attorneys, and a stipulation in writing having been filed waiving their right to a trial *to a* jury, and this cause having been argued and submitted to the court upon testimony, the following special findings of facts and conclusions of law are made and ordered entered upon the journal:

A jury having been waived by the parties, the court finds the following facts:

1st. That the plaintiff is now, and was at the time he became plaintiff herein, treasurer of Richland county, Ohio.

2nd. That for ten years next before the commencement of this suit the defendant was a citizen of said county; that for the years 61 1874, 1875, 1876, and 1877 he made returns in accordance with law, purporting to contain full and accurate lists of all his personal property subject to taxation in said county; that said returns were received and acted upon as being correct until the 23rd June, 1878, when the county auditor caused defendant to be subpœnaed to appear instanter before him at his office in said city, to give information pursuant to the statute in that case provided, of all property within his knowledge, which had not been duly returned for taxation. The defendant accordingly appeared and submitted to an examination. Whilst undergoing his said examination the auditor exhibited to him a list of judgments and mortgages in his favor not included in his said tax returns, and then and there told defendant that, under the advice of the auditor of State, he felt it to be his duty to make a supplemental assessment against him for the four years named, of all the property which he owned during that period, which was subject to taxation in said county, and not included in his returns; called defendant's attention to the statute under which he proposed to proceed, and requested such explanation as he might deem it proper to make. Defendant thereupon made such explanations as he chose to offer.

This was the only notice given by the auditor to the defendant of his intention to assess him on all personal property owned by defendant during said period, and not included in his tax returns.

62 Third. That the auditor then proceeded to assess said omitted property, as follows: For 1874, Western Union Telegraph stock, $100,000; for 1875, Western Union Telegraph stock, $100,000; credits, $35,000; for 1876, Western Union Telegraph stock, $100,000; credits, $41,090; for 1877, Western Union Telegraph stock, $100,000; credits, $41,090. Entered the same on a supplemental tax duplicate, and certified the same to the county treasurer for collection.

Fourth. That defendant owned said telegraph stock and credits so assessed during the four years aforesaid, and that the same had not been included in his said returns for taxation, and that he had not been theretofore charged with or paid any tax on the same.

Fifth. That defendant owned $100,000 of money, during the same period, which he kept in New York for speculative purposes, which was not returned by him for taxation and on which he has paid no taxes, either in New York or Ohio.

Sixth. That defendant during the entire four years aforesaid, the period covered by said reassessment owed *bona-fide* liabilities exceeding in amount the aforesaid credits assessed against him.

Seventh. That the Western Union Telegraph Company was organized under the laws of New York; that it had a paid-up capital of $41,000,000; that most of its property was and is situated outside of Ohio; that it owns 4,950 miles of telegraph wires, with the chemicals and office furniture had in connection therewith, in Ohio, all which for ten years past it has regularly returned for taxation, and 63 paid thereon from $10,000 to $15,000 per annum of tax to the State of Ohio.

From these facts the court deduces the following conclusions of law:

First. That the auditor possessed no authority, after defendant had made returns, as aforesaid, of his personal property for taxation, to make a supplemental assessment of property not included in defendant's said returns without first giving defendant the notice required by the statute in such case provided, and that an assessment made in the absence of such notice would be void.

Secondly. That the notice given, as shown by the facts found herein, is legally sufficient to sustain the assessment made, provided it was in all other respects regularly made and was authorized by the evidence adduced.

Third. That defendant is entitled to set off his *bona-fide* liabilities, which he owed during the years for which he was assessed, against the said assessment of credits, and, as these liabilities exceed his credits, no recovery can be had herein for the tax claimed to have been due on said credits.

Fourth. The money kept by defendant in New York for speculative purposes was taxable in Ohio, the place of defendant's domicile, and ought to have been returned by defendant for that purpose, but as he has not been assessed thereon, or sued therefor in this action, no recovery can be had, therefor, in this suit.

64 Fifth. The auditor's said supplemental assessment was authorized, and is regular and valid, and under the statutes of Ohio, as construed by the courts of the State, the defendant is liable in this action for the amounts assessed on his Western Union Telegraph stock, and judgment will therefore be rendered against him for the tax so assessed thereon, with the damages prescribed by statute, and interest and costs.

BAXTER, *Judge, &c.*

To each, all, and singular of said findings of fact, and as well to each and all of said findings and conclusions of law, aforesaid, the defendant then excepted.

And thereupon came on to be heard the defendant's motion for a new trial, which, upon due consideration by the court, is overruled.

It is, therefore, considered by the court that the plaintiff have and recover from the defendant the sum of ten thousand seven hundred twenty-seven and $\frac{65}{100}$ dollars ($10,727.65), the sum so, as aforesaid, found to be due, together with the costs of suit to be taxed, for which execution may issue.

And thereupon came the defendant and tendered his bill of exceptions to the ruling of the court on the trial of said cause, and, at the request of the defendant, the same is signed, sealed, and ordered to be made a part of the record of this case, which is accordingly done.

65 And afterwards, to wit, on the 29th day of November, A. D. 1881, being a day of the October term of said court, the following motion was filed in this cause in this court, to wit:

Motion by Defendant for New Trial.

In the Circuit of the United States for the Northern District of Ohio.

JOHN A. LEE, Treasurer of Richland County, O., Pl'ff, *against* STEPHEN B. STURGES, Def't.	Motion for New Trial by Defendant.

Now comes Stephen B. Sturges, defendant above named, and moves the court to set aside the findings and judgment of the said court herein made and rendered at this term of said court, and to grant a new trial of said cause for the reasons—

1. Because the findings of said court of the facts as to the notice given to this defendant of the intention of the auditor of Richland county, Ohio, to assess additional taxes against him, sought to be recovered

herein, are not sufficient in law to constitute the notice required by statute of the State of Ohio to authorize the said assessment of taxes, and did not give the said Stephen B. Sturges the opportunity provided by said statute to appear and show that the returns already made by him and on file in the auditor's office were correct.

66 2. Because the pleadings in the cause are not sufficient in law to authorize the judgment and findings aforesaid, in this, to wit:

I. The respective years for which said taxes were assessed should have been set out as several causes of action, together with the facts showing the right of recovery.

II. That the respective penalties on the said respective years of taxes so assessed should have been set out, together with the facts showing the right to recover them, and should have been so alleged in the pleadings as separate causes of action.

3. Because the facts so found do not sustain or authorize the said judgment rendered, in this, to wit, they do not show that the auditor of said county ever acquired jurisdiction to enter or assess said taxes on the duplicate of said county.

4. The facts so found do not show that a penalty ever accrued upon said taxes, or should have been added to said taxes. The facts so found do not show that interest has accrued or is chargeable on said taxes.

5. The facts so found do not sustain or authorize the finding that certificates or shares of stock in the Western Union Telegraph Company were taxable in the State of Ohio, in defendant's hands, or that valid assessments of taxes against defendant on account thereof or his ownership of the same could be levied under the laws of Ohio for the several years for which the same were assessed.

67 6. Said court erred in its findings, opinion, and judgment that the facts found by the court as to the notice to defendant constituted legal or sufficient notice to authorize the assessment of said taxes by said auditor.

7. Said court erred in finding that said auditor was authorized or empowered by the laws of Ohio, in force at the time of said assessment and action by said auditor, to assess any tax upon said shares of Western Union Telegraph stock for any year prior to the year 1878, or prior to the tax year in which said action and assessment was made or levied by said auditor.

8. Because said court erred in admitting testimony on the trial of said cause on the part of the plaintiff as to declarations and conversations to and with defendant by the county auditor, to prove the notice required by statute to be given to defendant, when defendant was before said auditor in obedience to a subpœna to appear and testify generally, which evidence was objected to by defendant at the time.

9. Because said subpœna was not competent evidence of notice required by the statute of Ohio.

10. Because the court erred in admitting parol evidence to be given on the trial of said cause by plaintiff as tending to establish the giving of such notice as the statute required said 68

auditor to give to defendant of his intention to make said assessment, and touching the matters examined upon and adduced on said examination of defendant before said auditor, which evidence defendant objected to at the time.

11. Because said court erred in admitting evidence given by plaintiff on said trial touching the amount of money kept or used by him in the city of New York in his stock or other enterprises, which evidence was irrelevant, and was objected to by defendant at the time.

12. Because said findings and judgment should have been in favor of defendant and against the plaintiff.

13. Because of other findings and rulings contrary to law appearing upon the record.

DERLAM AND LEYMAN,
Attorneys for Defendant.

And afterwards, to wit, on the 29th day of November, A. D. 1881, being a day of the October term, A. D. 1881, of said court, the following bill of exceptions was filed in this cause in this court, being in the words and figures following, to wit:

69 *Bill of Exceptions by Defendant.*

In the Circuit Court of the United States for the Northern District of Ohio.

JOHN A. LEE, Treasurer of Richland County, Ohio, Plaintiff,
against
STEPHEN B. STURGES, Defendant.

Be it remembered that on the trial of the above-entitled cause before the Honorable John Baxter, judge of said circuit court (a jury being waived by written stipulation of said parties on file), at the October term of said court, A. D. 1881, the plaintiff, to maintain the issue on his part, among other proofs offered in evidence a subpœna which it was agreed by both parties in open court was served upon said defendant, and in obedience to which defendant appeared before said auditor of Richland county, Ohio, to give testimony, of which subpœna the following is a correct copy, to wit:

"MANSFIELD, O., *July* 23, 1878.

"To S. B. STURGES:

"You are hereby notified to appear at the auditor's office in Mansfield, Richland county, Ohio, on this 23rd day of July, 1878, at 10 o'clock a. m., to give information as to any property, goods, or chattels in said county which has not been listed for taxation as provided by law.

(Signed) "M. D. WARD."

70 It was further agreed by both parties that no other written notice was served or given to said defendant in reference to

his returns of property for taxation, or the correction thereof by said auditor.

To the introduction of which subpœna in evidence the defendant at the time objected, for the reason that the same was incompetent; which objection was overruled by the court, and said subpœna was admitted in evidence by the court; to which ruling of the court in admitting said paper in evidence and overruling said objection the defendant at the time excepted.

The plaintiff, further to maintain said issue on his part, produced as a witness in his behalf M. D. Ward, who, being sworn, testified as follows:

"I am auditor of Richland county, and have been since November, 1877; I think Mr. Sturges came into my office the day after the subpœna was served; I showed him the testimony that I had there."

The counsel for plaintiff then asked the witness to state what he said to the defendant at that time; to which testimony, as to the declarations then made by the witness to defendant, the defendant objected, as incompetent; but the court overruled said objection and permitted said witness to answer said question; to which ruling of the court in admitting said testimony the defendant then excepted, and said witness answered as follows:

"I showed him a copy of the mortgages in the recorder's office, and the list of judgments in the county clerk's office; I also showed him the testimony of Mr. James and others as to the amount of
71 stock; I told him I intended to tax it under the advice of the
auditor of State. I showed the statute to him; I asked him as to the amount, and wanted him to correct it if there was anything wrong about it; I did not say anything else; I wrote down the testimony at that time; I carried the tax for the stock and for the mortgages and judgments on to the duplicate immediately after I had taken his testimony; I carried it on about the 25th day of July, a few days after the investigation."

To all of which testimony of said witness as to conversations and declarations with and to the defendant the counsel for said defendant objected, because the notice required by law to be given defendant of the intended correction of tax returned was by law required to be in writing, and because the examination of defendant before said auditor was by law required to be reduced to writing and made of record, and because said examination was reduced to writing, which writing was the best evidence of what then transpired before the auditor; but said objection was overruled by the court and said testimony admitted; to which ruling of the court, and the admission of said parol testimony, defendant at the time excepted.

After the plaintiff had rested his case, the defendant, to maintain the issue on his part, placed on the witness stand Stephen B. Sturges, the defendant, who, being duly sworn according to law, gave evidence tending to prove the matter set forth in his answer.

On the cross-examination of said witness, the witness was
72 asked if he had money in New York during the years 1874,
1875, 1876, and 1877, which he kept or used there in his business speculations; if so, what amounts of money he so kept there. To which question and the testimony so called for the defendant then and there objected; but the court overruled said objection, and permitted the witness to give testimony here following; to which ruling of the court in overruling said objection, and in admitting said evidence, counsel for defendant then excepted, and the said witness, in answer to said question, testified as follows: That he kept in New York from 1868 to 1878 from one to two hundred thousand dollars, at no time less than $100,000. It was used in speculations, sometimes invested in bonds and stocks, but when not so invested he kept it on deposit in bank.

Whereupon the said defendant presented to the court this his bill of exceptions, and prayed the court to allow and sign the same, and that it be ordered to be made a part of the record in this case; all of which is accordingly granted and ordered by the court, and said bill of exceptions allowed and signed, at the said October term of said court, A. D. 1881.

JOHN BAXTER, *Judge, &c.* [SEAL.]

73 *Supersedeas Bond.*

Supreme Court of the United States.

STEPHEN B. STURGES, Plaintiff in Error,
against
MERCHANT CARTER, Treasurer of Richland County, Ohio, Defendant in Error.

Know all men by these presents, that we, Stephen B. Sturges and S. Perry Sturges, of Brooklyn, New York, and Willis M. Sturges, of Mansfield, Richland county, Ohio, are held and firmly bound unto the said Merchant Carter, treasurer of Richland county, Ohio, and to his successor in said office of treasurer of Richland county, Ohio, in the penal sum of fifteen thousand dollars, to be paid to the treasurer of said Richland county, State of Ohio; to which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals. Dated this 10th day of January, A. D. 1882.

Whereas lately, at the October term, A. D. 1881, of the circuit court of the United States in and for the northern district of Ohio, in a suit depending in said court between Merchant Carter, treasurer of Richland county, Ohio, and Stephen B. Sturges, a final judgment
74 was rendered against the said Stephen B. Sturges, and the said Stephen B. Sturges having obtained a writ of error, and filed a copy thereof in the clerk's office of said court, to reverse the judgment in the aforesaid suit; and a citation, directed to said Merchant Carter, treasurer as aforesaid, citing and admonishing him